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Chapter V
Protection of persons in the event of disasters

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C. Text of the draft articles on the protection of persons in the event of disasters adopted by the Commission on first reading

2. Text of the draft articles with commentaries thereto

11. The text of the draft articles, together with commentaries thereto, adopted by the Commission on first reading is reproduced below. This text comprises a consolidated version of the commentaries adopted so far by the Commission, including modifications and additions made to commentaries previously adopted and commentaries adopted at the sixty-sixth session of the Commission.

Protection of persons in the event of disasters

Article 1 [1][1]
Scope

The present draft articles apply to the protection of persons in the event of disasters.

Commentary

(1) Draft article 1 [1] establishes the scope of the draft articles, and tracks the formulation of the title of the topic. It establishes the orientation of the draft articles as being primarily focused on the protection of persons whose life, well-being and property are affected by disasters. Accordingly, as established in draft article 2 [2], the focus is on facilitating a response that adequately and effectively meets the essential needs of the persons concerned, while respecting their rights.

(2) The draft articles cover, *ratione materiae*, the rights and obligations of States affected by a disaster in respect of persons present on their territory (irrespective of nationality) or under their jurisdiction or control, third States and international organizations and other entities in a position to cooperate, particularly in the provision of disaster relief and assistance. Such rights and obligations are understood to apply on two axes: the rights and obligations of States in relation to one another, and the rights and obligations of States in relation to persons in need of protection. While the focus is on the former, the draft articles also contemplate, albeit in general terms, the rights of individuals affected by disasters, as established by international law. Furthermore, as is elaborated in draft article 3 [3], the draft articles are not limited to any particular type of disaster.

(3) The scope *ratione personae* of the draft articles is limited to natural persons affected by disasters. In addition, the focus is primarily on the activities of States and international organizations and other entities enjoying specific international legal competence in the provision of disaster relief and assistance in the context of disasters. The activities of non-governmental organizations and other private actors, sometimes collectively referred to as "civil society" actors, are included within the scope of the draft articles only in a secondary manner, either as direct beneficiaries of duties placed on States (for example, of the duty of States to cooperate, in draft article 8 [5]) or indirectly, as being subject to the domestic laws, implementing the draft articles, of either the affected State, a third State or the State of nationality of the entity or private actor.

(4) As suggested by the phrase "in the event of" in the title of the topic, the scope of the draft articles *ratione temporis* is primarily focused on the immediate post-disaster response

[1] The numbers of the draft articles, as previously provisionally adopted by the Commission, are indicated in square brackets.

and recovery phase, including the post-disaster reconstruction phase. Nonetheless, the draft articles also, in draft articles 10 [5 *ter*] and 11 [16], where relevant, cover the pre-disaster phase as relating to disaster risk reduction and disaster prevention and mitigation activities.

(5) The draft articles are not limited, *ratione loci*, to activities in the arena of the disaster, but also cover those within assisting States and transit States. Nor is the transboundary nature of a disaster a necessary condition for the triggering of the application of the draft articles. Certainly, it is not uncommon for major disasters to have a transboundary effect, thereby increasing the need for international cooperation and coordination. Nonetheless, examples abound of major international relief assistance efforts being undertaken in response to disasters occurring solely within the territorial boundaries of a single State, or of those of a territory or area under its jurisdiction or control. While different considerations may arise, unless otherwise specified, no such distinction is maintained in the draft articles. In other words, the draft articles are not tailored with any specific disaster type or situation in mind, but are intended to be applied flexibly to meet the needs arising from all disasters, regardless of their transboundary effect.

Article 2 [2]
Purpose

The purpose of the present draft articles is to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights.

Commentary

(1) Draft article 2 [2] deals with the purpose of the draft articles. While it is not always the case for texts prepared by the Commission to include a provision outlining the objectives of the draft articles in question, it is not unprecedented. The 2006 Draft Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities include a provision (draft article 3 [3]) on purposes.

(2) The provision elaborates on draft article 1 [1] (scope) by providing further guidance on the purport of the draft articles. The main issue raised relates to the juxtaposition of "needs" versus "rights". The Commission was aware of the debate in the humanitarian assistance community on whether a "rights-based", as opposed to the more traditional "needs-based" approach was to be preferred, or vice versa. The prevailing sense of the Commission was that the two approaches were not necessarily mutually exclusive, but were best viewed as being complementary. The Commission settled for a formulation that emphasized the importance of a response which adequately and effectively meets the "needs" of persons affected by the disaster. Such response has to take place with full respect for the rights of such individuals.

(3) Although not necessarily a term of art, by "adequate and effective", what is meant is a high-quality response that meets the needs of the persons affected by the disaster. Similar formulations are to be found in existing agreements. These include "effective and concerted" and "rapid and effective", found in the ASEAN Agreement on Disaster Management and Emergency Response of 2006, as well as "proper and effective", used in the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, of 1998. Given the context in which such response is to be provided, an element of timeliness is implicit in the term "effective". The more drawn-out the response the less likely it is that it will be effective. This and other aspects of what makes a response "adequate" and "effective" is the subject of draft article 17 [14]. Notwithstanding this, it is understood that while a high standard is called for, it has, nonetheless, to be based in what is realistic and feasible "on the ground" in any given

disaster situation. Hence, no reference is made, for example, to the response having to be "fully" effective.

(4) The Commission decided not to formulate the provision in the form of a general statement on the obligation of States to ensure an adequate and effective response, as it was felt that it would not sufficiently highlight the specific rights and obligations of the affected State. It was not clear, for example, whether such formulation would sufficiently distinguish different obligations for different States, such as for the affected State as opposed to assisting States. Accordingly, a reference to States was not included, on the understanding that it was not strictly necessary for a provision on the purpose of the draft articles. The obligations of States are considered in draft articles 11 [16], 12 [9], 13 [10],14 [11], 17 [14] and 18.

(5) The phrase "response to disasters" needs to be read in conjunction with the general direction in draft article 1 [1] that the temporal application of the draft articles needs to be viewed, where relevant, to include the pre-disaster risk-reduction, prevention and mitigation phase, as well as with draft articles 10 [5 *ter*] and 11 [16]. While other formulations specifying all the phases of assistance were considered, the Commission opted for the present, more economical, phrasing, without intending to favour a strict interpretation that would render the provision applicable only to the response phase of disaster assistance activities.

(6) The word "facilitate" reflects the vision of the Commission for the role the draft articles might play in the overall panoply of instruments and arrangements that exist at the international level in the context of disaster relief and assistance. It was felt that while the draft articles could not by themselves ensure a response, they were intended to facilitate an adequate and effective response.

(7) The qualifier "essential" before the term "needs" was included in order to indicate more clearly that the needs being referred to are those related to survival or similarly essential needs in the aftermath of a disaster. It was felt that "essential" clearly brought out the context in which such needs arise. Such reference should be further understood in the context of the importance of taking into account the needs of the particularly vulnerable, as indicated in draft article 7 [6].

(8) By "persons concerned" what is meant are people directly affected by the disaster, as opposed to individuals more indirectly affected. This term was included so as to further qualify the scope of application of the draft articles. This is in conformity with the approach taken by existing instruments, which focus on the provision of relief to persons directly affected by a disaster. This is not to say that individuals who are more indirectly affected, for example, through loss of family members in a disaster or who suffered economic loss owing to a disaster elsewhere, would be without remedy. Instead, it is not the intention of the Commission to cover their situation in the draft articles.

(9) As regards the reference to rights, it was understood that some of the relevant rights are economic and social rights, which States have an obligation to ensure progressively. As such, the present formula of "with full respect for" was accepted as being more neutral, but nonetheless carries an active connotation of the rights being "fully" respected, as confirmed by draft article 6 [8]. In addition, the phrase intentionally leaves the question of how those rights are to be enforced to the relevant rules of international law themselves. It is understood that there is an implied degree of latitude in the applicability of rights, conditioned by the extent of the impact of the disaster. The extent of such latitude is to be ascertained by the relevant rules recognizing or establishing the rights in question.

(10) The reference to "rights" is not only a reference to human rights, but also, inter alia, to rights acquired under domestic law. A suggestion to draw up a list of applicable rights did not meet with approval for the simple reason that it is not possible to consider all

potentially applicable rights, and out of concern that such a list could lead to an *a contrario* interpretation that rights not mentioned therein were not applicable. Nonetheless, it is contemplated that the reference would include such applicable rights as the right to life, as recognized in article 6, paragraph 1, of the International Covenant on Civil and Political Rights.[2]

Article 3 [3]
Definition of disaster

"Disaster" means a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.

Commentary

(1) Draft article 3 [3] seeks to define the term "disaster" for the purpose of the draft articles. It was considered necessary to delimit the definition so as to properly capture the scope of application of the draft articles, as established in draft article 1 [1], while not, for example, inadvertently also dealing with other serious events, such as political and economic crises, which may also undermine the functioning of society. Such delimitation of the definition is evident from two features of the definition: (1) the emphasis placed on the existence of an event which caused the disruption of society; and (2) the inclusion of a number of qualifying phrases.

(2) The Commission considered the approach of the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations of 1998, of conceptualizing a disaster as being the consequence of an event, namely the serious disruption of the functioning of society caused by that event, as opposed to being the event itself. The Commission was aware that such approach represented contemporary thinking in the humanitarian assistance community, as confirmed by the 2005 World Conference on Disaster Reduction, convened by the United Nations at Hyogo in Japan, as well as by recent treaties and other instruments, including the 2007 IFRC Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance.[3] Nonetheless, the prevailing view was that the Commission was free to shift the emphasis back to the earlier conception of "disaster" as being a specific event, since it was embarking on the formulation of a legal instrument, which required a more concise and precise legal definition, as opposed to one that is more policy-oriented.

(3) The element of the existence of an event is qualified in several ways. First, the reference to a "calamitous" event serves to establish a threshold, by reference to the nature of the event, whereby only extreme events are covered. This was inspired by the definition embodied in the Resolution on Humanitarian Assistance adopted by the Institute of International Law at its 2003 Bruges session,[4] which deliberately established such higher threshold so as to exclude other acute crises. What constitutes "calamitous" is to be understood both by application of the qualifier in the remainder of the provision, viz. "... resulting in widespread loss of life, great human suffering and distress or large-scale

[2] United Nations, *Treaty Series*, vol. 999, p. 171 and vol. 1057, p. 407. See too: Inter-Agency Standing Committee (IASC) Operational Guidelines on Human Rights and Natural Disasters, 2006. See also paras. (2) and (3) of the commentary to draft art. 6 [8].

[3] International Federation of Red Cross and Red Crescent Societies, Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance ("IFRC Guidelines"), 2007.

[4] Resolution on Humanitarian Assistance. adopted by the Institute of International Law, 2 September 2003, Bruges, Belgium ("Resolution on Humanitarian Assistance").

material or environmental damage, thereby seriously disrupting the functioning of society"; and by keeping in mind the scope and purpose of the draft articles, as articulated in draft articles 1 [1] and 2 [2]. In addition, reference is made to "event or series of events" in order to cover those types of events which, on their own, might not meet the necessary threshold, but which, taken together, would constitute a calamitous event for purposes of the draft articles. No limitation is included concerning the origin of the event, i.e. whether natural or man-made, in recognition of the fact that disasters often arise from complex sets of causes that may include both wholly natural elements and contributions from human activities.

(4) The event is further qualified by two causation requirements. First for the event, or series of events, to be considered "calamitous" in the sense required by the draft articles, it has to result in one or more of three possible outcomes: widespread loss of life, or great human suffering and distress, or large-scale material or environmental damage. Accordingly, a major event such as a serious earthquake, which takes place in the middle of the ocean or in an uninhabited area, and which does not result in at least one of the three envisaged outcomes, would not satisfy the threshold requirement in draft article 3 [3]. In addition, the nature of the event is further qualified by the requirement that any, or all, of the three possible outcomes, as applicable, result in the serious disruption of the functioning of society. In other words, an event which resulted in, for example, the widespread loss of life, but does not seriously disrupt the functioning of society, would not, accordingly, satisfy the threshold requirement. Hence, by including such causal elements, the definition retains aspects of the approach taken in contemporary texts, as exemplified by the Tampere Convention, namely by considering the consequence of the event as a key aspect of the definition, albeit for purposes of establishing the threshold for the application of the draft articles.

(5) The element of "widespread loss of life" is a refinement, inspired by the 1995 Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief. The requirement of "widespread" loss of life serves to exclude isolated events which result in relatively low loss of life; it being borne in mind that such events could nonetheless satisfy one of the other causal requirements. Conversely, an event causing widespread loss of life could, on its own, satisfy the causation requirement and could result in the triggering of the application of the draft articles if it resulted in the serious disruption of the functioning of society.

(6) The possibility of "great human suffering and distress" was included out of recognition that many major disasters are accompanied by widespread loss of life or by great human suffering and distress. Accordingly, cases where an event has resulted in relatively localized loss of life, owing to adequate prevention and preparation, as well as effective mitigation actions, but nonetheless has caused severe dislocation resulting in great human suffering and distress which seriously disrupt the functioning of society, would be covered by the draft articles.

(7) "Large-scale material or environmental damage" was included by the Commission in recognition of the wide-scale damage to property and the environment typically caused by major disasters, and the resultant disruption of the functioning of society arising from the severe setback for human development and well-being that such a loss typically causes. It is to be understood that it is not the environmental or property loss per se that would be covered by the draft articles, but rather the impact on persons of such loss; thus avoiding a consideration of economic loss in general. A requirement of economic loss might unnecessarily limit the scope of the draft articles, by, for example, precluding them from also dealing with activities designed to mitigate potential future human loss arising from existing environmental damage.

(8) As already alluded to, the requirement of serious disruption of the functioning of society serves to establish a high threshold which would exclude from the scope of

application of the draft articles other types of crises such as serious political or economic crises. Such differences in application is further borne out by the purpose of the draft articles, as established in draft article 2 [2], and by the fact that the type of protection required, and rights involved, in those other types of crises may be different, and are, to varying extents, regulated by other rules of international law, as anticipated in draft article 20.

(9) While the three possible outcomes envisaged provide some guidance on what might amount to a serious disruption of the functioning of society, the Commission refrained from providing further descriptive or qualifying elements, so as to leave some discretion in practice.

Article 4
Use of terms

For the purposes of the present draft articles:

(a) "affected State" means the State in the territory or otherwise under the jurisdiction or control of which persons, property or the environment are affected by a disaster;

(b) "assisting State" means a State providing assistance to an affected State at its request or with its consent;

(c) "other assisting actor" means a competent intergovernmental organization, or a relevant non-governmental organization or any other entity or individual external to the affected State, providing assistance to that State at its request or with its consent;

(d) "external assistance" means relief personnel, equipment and goods, and services provided to an affected State by assisting States or other assisting actors for disaster relief assistance or disaster risk reduction;

(e) "relief personnel" means civilian or military personnel sent by an assisting State or other assisting actor for the purpose of providing disaster relief assistance or disaster risk reduction;

(f) "equipment and goods" means supplies, tools, machines, specially trained animals, foodstuffs, drinking water, medical supplies, means of shelter, clothing, bedding, vehicles and other objects for disaster relief assistance or disaster risk reduction.

Commentary

(1) The Commission's practice, as reflected in most of the draft articles adopted on diverse topics of international law, has been to include a provision on the "use of terms". Some of the terms selected for inclusion in draft article 4 were specifically singled out, in the commentaries to various draft articles, as requiring definition. Other terms were included because of their overall frequency of occurrence in the draft articles. The Commission considered it unnecessary to include definitions for "relevant non-governmental organization" and "risk of disasters", both of which are terms of art.

Subparagraph (a)

(2) Subparagraph (a), which defines the term "affected State", for purposes of the draft articles, is inspired by the definition of the same term provided in the IFRC Guidelines.[5] It reflects the basic orientation that the draft articles are primarily addressed to States. It also anticipates the centrality of the role to be played by the State affected by the disaster, as established in draft article 12 [9].

(3) The key feature in disaster response or disaster risk reduction is State control. In most cases that would accord with control exercised by the State upon whose territory the disaster occurs. Accordingly, the scenario in draft article 12 [9], paragraph 1, in which an affected State, "by virtue of its sovereignty", has the duty to ensure protection, is covered by the reference to "territory" in subparagraph (a). However, this does not necessarily exclude other scenarios, where a State may exercise *de jure* jurisdiction, or *de facto* control, over another territory on which a disaster occurs. The Commission considered that a State exercising jurisdiction or control over a territory (other than its own) or area on which a disaster occurs, would also be considered an "affected State" for purposes of the draft articles. Such possibility is also implicit in the recognition, in draft article 21 [4], that the draft articles would apply in the context of so-called "complex disasters", which occur on the same territory where an armed conflict is taking place. The phrase "in the territory or otherwise under the jurisdiction or control of which" was drawn from the definition of "State of origin" in article 2, subparagraph (d), of the 2001 articles on prevention of transboundary harm from hazardous activities.[6]

(4) The Commission recognized that the implication of including States exercising jurisdiction or control was that, in exceptional cases, there may be two affected States: the State upon whose territory the disaster occurs, and the State exercising jurisdiction or control over that territory. At the present stage, the Commission was of the view that draft article 14 [11] (requirement of the consent of the affected State), did not, in the absence of any special agreement between the two States, provide a definitive solution as to which affected State's consent would be required.

(5) The definition further seeks to reflect the focus of the draft articles, namely the effect on persons, as opposed to, for example, simply asserting that it is the State upon whose territory a disaster takes place. The reference to property has been retained as a further element common to many disasters, and implied in the reference to "large-scale material ... damage" in the definition of disaster in draft article 3 [3]; it being understood that the draft articles apply only to the impact of economic loss on persons.[7] The provision was also aligned with draft article 3 [3], so as to not only cover persons and property affected by a disaster but also damage to the environment.

(6) The formulation of the phrase "affected by a disaster" reflects the contemporary view that the focus of attention is on the effects of a disaster on persons and property, as opposed to the disaster itself. It also accords with the Commission's approach of considering the consequence of the event as a key element for purposes of establishing the threshold for the application of the draft articles.[8]

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[5] *Ibid.*, art. 2 (8) ("[t]he State upon whose territory persons or property are affected by a disaster").
[6] G.A. Res. 62/68 of 6 December 2007, annex, art. 2.
[7] See para. (7) of the commentary to draft art. 3 [3].
[8] *Ibid.*, para. (4).

Subparagraph (b)

(7) The draft articles are addressed to three categories of entities; the first being the affected State (defined above), and the second being the State or States providing assistance to the affected State. The third category, "other assisting actors", is defined in subparagraph (c).

(8) The definition of "assisting State" in subparagraph (b) is drawn from the definition of "supporting State" in the Framework Convention on Civil Defence Assistance of 2000,[9] with the term "Beneficiary State" changed to "affected State", which is the term utilized in the draft articles and defined in subparagraph (a). The phrase "a State providing assistance" is a reference to the concept of "external assistance", which is defined in subparagraph (d), and which is undertaken on the basis of the duty to cooperate in draft article 8 [5], read together with draft articles 9 [5 *bis*] and 10 [5 *ter*].

(9) A State is only categorized as an "assisting State" once the assistance is being or has been provided. In other words, a State offering assistance is not an "assisting State", with the various legal consequences that flow from such categorization, as provided for in the draft articles, until such assistance has been accepted or consented to by the affected State, in accordance with draft article 14 [11].

(10) The phrase "at its request or with its consent" reflects the interplay between draft articles 13 [10], 14 [11] and 16 [12]. In particular, it reflects the basic stance taken in the draft articles that it is the duty of the affected State to seek external assistance when its national response capacity has been overwhelmed by a disaster (draft article 13 [10]). At the same time, it envisages the possibility of the affected State receiving unsolicited offers of external assistance, as provided for under draft article 16 [12], the provision of which is subject to its consent, under draft article 14 [11].

Subparagraph (c)

(11) In addition to affected and assisting States, the draft articles also seek to regulate the position of other assisting actors. A significant proportion of contemporary disaster risk reduction and disaster relief activities are undertaken by, or under the auspices of, international organizations, including but not limited to the United Nations, as well as non-governmental organizations and other entities and even individuals. This group of actors is collectively referred to in the draft articles as "other assisting actors". This is without prejudice to their differing legal status under international law, which is acknowledged in the draft articles, for example, in draft article 16 [12].[10]

(12) The provision reflects, in part, the commentary to draft article 19 [15], which confirms the understanding that the term "assisting actors" refers primarily to, in the formulation employed in draft article 8 [5], "competent intergovernmental organizations" and "relevant non-governmental organizations".[11] The phrase "or any other entity or person", which is drawn from the ASEAN Agreement,[12] was added in recognition of the fact that not all actors which are involved in disaster relief efforts can be categorized in one or the other category mentioned. In particular, that phrase is to be understood as a term of

[9] United Nations, *Treaty Series*, vol. 2172, p. 213, art. 1 (f) ("Framework Convention on Civil Defence Assistance").

[10] See para. (4) of the commentary to draft art. 16 [12].

[11] See para. (4) of the commentary to draft art. 19 [15].

[12] ASEAN Agreement on Disaster Management and Emergency Response, 26 July 2005 ("ASEAN Agreement"), ASEAN Documents Series 2005, p. 157, art. 1 (1) (definition of "assisting entity").

art referring to the International Committee of the Red Cross (ICRC) and the International Federation of the Red Cross and Red Crescent Societies (IFRC).

(13) The phrase "external to the affected State" reflects the position, also mentioned in the commentary to draft article 15 [13], that the draft articles regulate the activities of actors which are external to the affected State.[13] Accordingly, the activities of domestic non-governmental organizations, for example, are not covered. Nor would a domestic actor incidentally fall within the scope of application of the draft articles through the act of securing, or attempting to secure, assistance from abroad.

(14) As with the definition of "assisting State", in subparagraph (b), the concluding phrase "providing assistance to that State at its request or with its consent" is a reference to the interplay between draft articles 13 [10], 14 [11] and 16 [12]. It is also included in recognition of the broad range of activities typically undertaken by the entities in question, in the context of both disaster risk reduction and the provision of disaster relief assistance, and which are regulated by the draft articles.

Subparagraph (d)

(15) Subparagraph (d) seeks to define the type of assistance which the draft articles envisage assisting States or other assisting actors providing to the affected State, as a form of cooperation anticipated in draft articles 9 [5 *bis*] and 10 [5 *ter*].

(16) The formulation, which draws inspiration from the commentary to draft article 15 [13],[14] is based on both the Oslo Guidelines and the Framework Convention on Civil Defence Assistance of 2000.[15] The reference to "material", in the Oslo Guidelines was replaced with "equipment and goods", which is the term used in the draft articles, and which is defined in subparagraph (f).

(17) The phrase "provided to an affected State by assisting States or other assisting actors" reiterates the nature of the legal relationship between the assisting State or actor and the affected State, as envisaged in the draft articles.

(18) The concluding clause seeks to clarify the purpose for which external assistance ought to be provided, namely "for disaster relief assistance or disaster risk reduction". While the formulation is cast in the technical terminology of disaster response and disaster risk reduction, it is understood to accord with the overall purpose of the draft articles, set out in draft article 2 [2], namely to "facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights".

Subparagraph (e)

(19) The subparagraph seeks to define the personnel component of external assistance provided by assisting States or by other assisting actors. The formulation employed is inspired by that adopted by the Commission in the commentary to draft article 9 [5 *bis*].[16] The definition indicates the two types of personnel which are typically sent for the purpose of providing disaster relief assistance or disaster risk reduction, as alluded to in draft article 17 [14], subparagraph 1(a), namely "civilian" or "military" personnel. The reference to the latter category was also inspired by the bilateral treaty between Greece and the Russian

[13] See para. (2) of the commentary to draft art. 15 [13].
[14] *Ibid.*
[15] See art. 1 (d) (definition of "assistance").
[16] See para. (7) of the commentary to draft art. 9 [5 *bis*].

Federation of 2000,[17] and is intended as a recognition of the important role played by military personnel, as a category of relief personnel, in the provision of disaster relief assistance.[18] While the reference to military personnel is more pertinent to the case of assisting States, the term "civilian" personnel is meant to be broad enough to cover such personnel sent by assisting States and other assisting actors. That these are options open to some, but not all, assisting entities (including States) is confirmed by the presentation of the phrase in the alternative ("or").

(20) While the phrase "civilian or military personnel" was selected to accord with the formulation used in draft article 17 [14], it is understood that such personnel are typically "specialized" personnel, as referred to in the annex to General Assembly resolution 46/182, in that what is expected are personnel which enjoy the necessary skill set, and are provided with the necessary equipment and goods, as defined in subparagraph (f), to perform the functions in question.

(21) The phrase "sent by" establishes a nexus between the assisting entity, whether a State or other actor, and the personnel in question. The Commission decided against making a reference to "acting on behalf of" so as to avoid the applicability of the rules of international law on the attribution of conduct to States or international organizations,[19] since the personnel sent by an assisting State or actor would be subject to the overall direction and control of the affected State, in accordance with draft article 12 [9].

(22) The traditional application of the concept of "relief personnel" has been in the context of the response to the onset of a disaster. This continues to be reflected in the formulation "for the purpose of providing disaster relief assistance", which mirrors the type of external assistance envisaged in draft article 17 [14], for which the facilitation of "prompt and effective" provision is called for. Nonetheless, as in the case of the definition of "external assistance", in subparagraph (d), the concluding clause has been aligned with the overall purpose of the draft articles, as established in draft article 2 [2], so as to also anticipate relief personnel being involved in disaster risk reduction, as envisaged in draft article 10 [5 *ter*].

Subparagraph (f)

(23) As indicated under subparagraph (d), "equipment" and "goods" are a key component of the kind of external assistance being envisaged in the draft articles. The formulation is drawn from the commentary to draft article 17 [14],[20] as well as the resolution on Humanitarian Assistance of the International Law Institute. The list covers the types of material generally accepted to be necessary for the provision of disaster relief assistance. That the list is not exhaustive is confirmed by the reference to "other objects".

(24) Generally speaking, two types of material are being envisaged: the technical "equipment" required by the disaster relief personnel to perform their functions, both in terms of their own sustenance and in terms of what they require to provide relief, such as supplies, tools and machines; and that ("goods") which is necessary for the survival and the fulfilment of the essential needs of the victims of disasters, such as foodstuffs, drinking

[17] Agreement between the Government of the Hellenic Republic and the Government of the Russian Federation on Cooperation in the Field of Prevention and Response to Natural and Man-Made Disasters, of 21 February 2000, art. 1 (definition of "team for providing assistance").

[18] See para. (4) of the commentary to draft art. 17 [14].

[19] See Articles on the Responsibility of States for Internationally Wrongful Acts, 2001, G.A. Res. 56/83 of 12 December 2001, annex, arts. 4–9, and Articles on the Responsibility of International Organizations, 2011, G.A. Res. 66/98 of 9 December 2011, annex, arts. 6–7.

[20] See para. (5) of the commentary to draft art. 17 [14].

water, medical supplies, means of shelter, clothing and bedding. Search dogs are specifically anticipated in the phrase "specially trained animals", which is drawn from Specific Annex J of the Kyoto Convention.[21] The Commission considered the definition to be sufficiently flexible to also include services which might be provided by relief personnel.

Article 5 [7]
Human dignity

In responding to disasters, States, competent intergovernmental organizations and relevant non-governmental organizations shall respect and protect the inherent dignity of the human person.

Commentary

(1) Draft article 5 [7] addresses the principle of human dignity in the context of disaster response. The Commission recognizes human dignity as the core principle that informs and underpins international human rights law. In the context of the protection of persons in the event of disasters, human dignity is situated as a guiding principle both for any action to be taken in the context of the provision of relief, and in the ongoing evolution of laws addressing disaster response.

(2) The principle of human dignity undergirds international human rights instruments and has been interpreted as providing the ultimate foundation of human rights law. Reaffirmation of "the dignity and worth of the human person" is found in the preamble to the Charter of the United Nations, while the preamble to the 1948 Universal Declaration of Human Rights declares "recognition of the inherent dignity [...] of all members of the human family is the foundation of freedom, justice and peace in the world". Affirmation of the principle of human dignity can be found in the International Covenant on Civil and Political Rights,[22] the International Covenant on Economic, Social and Cultural Rights,[23] the International Convention on the Elimination of all Forms of Racial Discrimination,[24] the Convention on the Elimination of All Forms of Discrimination Against Women,[25] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[26] and the Convention on the Rights of the Child.[27] The principle is also central to the field of international humanitarian law. The concept of personal dignity is recognized in common article 3, paragraph 1 (c) of the 1949 Geneva Conventions,[28] articles 75 and 85 of Protocol I,[29] and article 4 of Protocol II.[30]

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[21] International Convention on the Simplification and Harmonization of Customs Procedures ("Kyoto Convention") of 18 May 1973, United Nations, *Treaty Series*, vol. 950, p. 269, as revised by the Protocol of Amendment to the International Convention on the Simplification and Harmonization of Customs Procedures of 26 June 1999, United Nations, *Treaty Series*, vol. 2370, p. 27 (definition of "relief consignments").

[22] Preambular paragraphs; art. 10, para. 1.

[23] United Nations, *Treaty Series*, vol. 993, p. 3, preambular paragraphs; art. 13, para. 1.

[24] *Ibid.*, vol. 660, p. 195, preambular paragraphs.

[25] *Ibid.*, vol. 1249, p. 13, preambular paragraphs.

[26] *Ibid.*, vol. 1465, p. 85, preambular paragraphs.

[27] *Ibid.*, vol. 1577, p. 3, preambular paragraphs; arts. 23, para. 1; 28, para. 2; 37; 39 and 40.

[28] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, United Nations, *Treaty Series*, vol. 75, p. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, United Nations, *Treaty Series*, vol. 75, p. 85; Geneva Convention relative to the Treatment of Prisoners of War, United Nations, *Treaty Series*, vol. 75, p. 135; and Geneva Convention relative to the Protection of Civilian Persons in Time of War, United Nations, *Treaty Series*, vol. 75, p. 287 ("1949 Geneva

(3) The concept of human dignity also lies at the core of numerous instruments at the international level directed towards the provision of humanitarian relief in the event of disasters. The IFRC Guidelines state that "[a]ssisting actors and their personnel should [...] respect the human dignity of disaster-affected persons at all times".[31] General Assembly resolution 45/100 holds that "the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity".[32] The Institute of International Law likewise reflects that a failure to provide humanitarian assistance to those affected by disasters constitutes "an offence to human dignity".[33]

(4) The opening phrase of draft article 5 [7], "[i]n responding to disasters", reflects the substantive context in which the provision applies. While it is anticipated that the phrase is primarily directed towards the response and recovery phase, the reference should be read in light of paragraph (5) of the commentary to draft article 2 [2]. The Commission chose the term "responding to" over the more generic "in their response", so as to give a sense of the continuing nature of the obligation to respect and protect the human dignity of affected persons throughout the duration of the response period. The precise formulation of the principle adopted by the Commission, namely the "inherent dignity of the human person", is drawn from the preamble of the International Covenant on Economic, Social and Cultural Rights, and article 10, paragraph 1, of the International Covenant on Civil and Political Rights. This formulation has also been adopted in instruments such as the Convention on the Rights of the Child,[34] and the American Convention on Human Rights.[35]

(5) The phrase "States, competent intergovernmental organizations and relevant non-governmental organizations" provides an indication of the actors to which the provision is addressed. In its reference to "States", the Commission recognizes the role played both by affected States and assisting States in disaster response activities (see draft articles 12 [9] to 18). As a whole, the phrase recognizes that much of the activity in the field of disaster response occurs through organs of intergovernmental organizations, non-governmental organizations, and other non-State entities such as the IFRC.[36] The Commission determined

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Conventions"), common art. 3, para. 1 (noting the prohibition on "outrages upon personal dignity, in particular humiliating and degrading treatment").

[29] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, United Nations, *Treaty Series*, vol. 1125, p. 3, art. 75, para. 2 (b), (noting the prohibition on "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault"); art. 85, para. 4 (c) (noting that when committed wilfully and in violation of the Conventions or the Protocol, "practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination" are regarded as grave breaches of the Protocol).

[30] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977, United Nations, *Treaty Series*, vol. 1125, p. 609, art. 4, para. 2 (e) (noting the prohibition on "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault").

[31] IFRC Guidelines, art. 4, para. 1.

[32] General Assembly resolution 45/100 of 14 December 1990, preambular paragraph.

[33] Resolution on humanitarian assistance, art. II, para. 1.

[34] Convention on the Rights of the Child, art. 37 (c) (noting inter alia that "[e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person").

[35] American Convention on Human Rights, Organization of American States, *Treaty Series*, No. 36, United Nations, *Treaty Series*, vol. 1144, p. 123, art. 5, para. 2 (noting inter alia that "[a]ll persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person").

[36] See *Official Records of the General Assembly, Sixty-first session, Supplement No. 10* (A/61/10), Annex C, para. 28.

that the current formulation maintained consistency with draft article 8 [5], as opposed to a more general reference to "other relevant actors".

(6) The Commission adopted the phrase "respect and protect" as a formula that accords with contemporary doctrine and jurisprudence in international human rights law. The formula is used in a number of instruments that relate to disaster relief, including the Oslo Guidelines,[37] the Mohonk Criteria,[38] the Guiding Principles on Internal Displacement,[39] and the Guiding Principles on the Right to Humanitarian Assistance.[40] In conjunction, the terms "respect and protect" connote a negative obligation to refrain from injuring the inherent dignity of the human person and a positive obligation to take action to maintain human dignity. By way of example, the duty of protection requires States to adopt legislation proscribing activities of third parties in circumstances that threaten a violation of the principle of respect for human dignity. The Commission considered that an obligation to "protect" should be commensurate with the legal obligations borne by the respective actors addressed in the provision. An affected State therefore holds the primary role in the protection of human dignity, by virtue of its primary role in the direction, control, coordination and supervision of disaster relief and assistance, reflected in draft article 12 [9], paragraph 2.

Article 6 [8]
Human rights

Persons affected by disasters are entitled to respect for their human rights.

Commentary

(1) Draft article 6 [8] seeks to reflect the broad entitlement to human rights protection held by those persons affected by disasters. A corresponding obligation on relevant actors to protect such rights is implicit in the draft article. The Commission recognizes an intimate connection between human rights and the principle of human dignity reflected in draft article 5 [7], reinforced by the close proximity of the two draft articles.

(2) The general reference to "human rights" encompasses human rights obligations expressed in relevant international agreements and reflected in customary international law, as well as assertions of best practices for the protection of human rights included in non-binding texts on the international level. The Commission decided not to limit the provision to obligations "set out in the relevant international agreements". The formulation adopted by the Commission indicates the broad field of human rights obligations, without seeking to specify, add to, or qualify those obligations.

(3) The Commission considered that the reference to "human rights" incorporates both the substantive rights and limitations that exist in the sphere of international human rights

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[37] Guidelines on the Use of Military and Civil Defence Assets in Disaster Relief ("Oslo Guidelines"), revised on 1 November 2007, para. 20 (noting that "[t]he dignity and rights of all victims must be respected and protected").

[38] J.M. Ebersole, "The Mohonk Criteria for Humanitarian Assistance in Complex Emergencies" ("Mohonk Criteria"), *Human Rights Quarterly*, vol. 17, No. 1 (February 1995), p. 196 ("noting that "[t]he dignity and rights of all victims must be respected and protected").

[39] E/CN.4/1998/53/Add.2, annex, principle 26 (noting inter alia that "[p]ersons engaged in humanitarian assistance, their transport and supplies shall be respected and protected").

[40] Guiding Principles on the Right to Humanitarian Assistance, adopted by the Council of the International Institute of Humanitarian Law in April 1993, principle 10 (noting that "[h]umanitarian assistance can, if appropriate, be made available by way of 'humanitarian corridors' which should be respected and protected by competent authorities of the parties involved and if necessary by the United Nations authority").

law. In particular, the provision contemplates an affected State's right of derogation where recognized under existing international human rights law.

(4) As clarified in the commentary to draft article 1 [1], at paragraph (3), the scope *ratione personae* of the draft articles includes the activities of States and international organizations and other entities enjoying specific international legal competence in the provision of disaster relief and assistance in the context of disasters. The Commission recognizes that the scope and content of an obligation to protect the human rights of those persons affected by disasters will vary considerably between these actors. The neutral phrasing adopted by the Commission should be read in light of an understanding that distinct obligations will be held by affected States, assisting States, and various other assisting actors, respectively.

(5) The reference at the beginning of draft article 6 [8] to "persons affected by disasters" reaffirms the context in which the draft articles apply, and is not to be understood as implying that persons not affected by a disaster do not similarly enjoy such rights.

Article 7 [6]
Humanitarian principles

Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable.

Commentary

(1) Draft article 7 [6] establishes the key humanitarian principles relevant to disaster response. The title of the draft article serves to indicate that the principles indicated therein are considered by the Commission to constitute humanitarian principles that underlie disaster relief and assistance. On this basis the Commission did not find it necessary to determine whether these principles are also general principles of international law, and noted that the principles do not apply to the exclusion of other relevant principles of international law. The Commission opted to enshrine the principles in the form of a draft article in recognition of their significance to the provision of disaster relief and assistance.

(2) The principles of humanity, neutrality and impartiality are core principles recognized as foundational to humanitarian assistance.[41] The principles are likewise fundamental to applicable laws in disaster relief efforts. By way of example, General Assembly resolution 46/182 notes that "[h]umanitarian assistance must be provided in accordance with the principles of humanity, neutrality, and impartiality".[42]

(3) The principle of humanity stands as the cornerstone of the protection of persons in international law. Situated as an element both of international humanitarian law and international human rights law, it informs the development of laws regarding the protection of persons in the event of disasters. Within the field of international humanitarian law, the principle is most clearly expressed in the requirement of humane treatment in common article 3 of the 1949 Geneva Conventions.[43] However, as the International Court of Justice

[41] See discussion in the Secretariat Memorandum, A/CN.4/590, para. 11.

[42] General Assembly resolution 46/182 of 19 December 1991, annex, para. 2.

[43] See, e.g., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, art. 3, para. 1 (noting that "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria").

affirmed in the Corfu Channel case (merits), elementary considerations of humanity are also general and well-recognized principles of the international legal order, "even more exacting in peace than in war".[44] Pictet's commentary on the principles of the Red Cross attributes three elements to the principle of humanity: to prevent and alleviate suffering, to protect life and health, and to assure respect for the individual".[45] In the specific context of disaster relief, the Oslo Guidelines and the Mohonk Criteria affirm that the principle of humanity requires that "human suffering must be addressed wherever it is found".[46]

(4) While the principle of neutrality is rooted in the context of an armed conflict, the Commission determined that the principle is nonetheless applicable in other branches of the law. In the context of humanitarian assistance, the principle of neutrality has acquired a more specific meaning that is reflected in draft article 7 [6]. In this setting the principle requires that the provision of assistance be independent of any given political, religious, ethnic, or ideological context. The Oslo Guidelines and the Mohonk Criteria both affirm that the assistance should be provided "without engaging in hostilities or taking sides in controversies of a political, religious or ideological nature".[47] As such the principle of neutrality indicates the apolitical nature of disaster response, and affirms that humanitarian activities may not be used for purposes other than responding to the disaster at hand. The principle ensures that the interest of those persons affected by disasters are the primary concern of the affected State and any other relevant actors in disaster response. Respect for the principle of neutrality is central to facilitating the achievement of an adequate and effective response to disasters, as outlined in draft article 2 [2]. Neutrality can therefore be considered an operational mechanism to implement the ideal of humanity.

(5) The principle of impartiality encompasses three principles: non-discrimination, proportionality, and impartiality proper. For reasons discussed below, the principle of non-discrimination is articulated by the Commission not merely as an element of draft article 7 [6], but also as an autonomous principle of disaster response. Non-discrimination is directed towards the removal of objective grounds for discrimination between individuals, such that the provision of assistance to affected persons is guided solely by their needs. The principle of proportionality stipulates that the response to a disaster be proportionate to the scope of that disaster and the needs of affected persons. The principle also acts as a distributive mechanism, enabling the provision of assistance to be delivered with attention given to the most urgent needs. Impartiality proper reflects the principle that no subjective distinctions be drawn between individuals in the response to disasters. The Commentary to the First Protocol Additional to the Geneva Conventions thus conceptualizes impartiality as "a moral quality which must be present in the individual or institution called upon to act for the benefit of those who are suffering".[48] By way of example, the Draft International Guidelines for Humanitarian Assistance Operations provide that "[h]umanitarian assistance should be provided on an impartial basis without any adverse distinction to all persons in

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[44] *United Kingdom of Great Britain and Northern Ireland v. Albania ("Corfu Channel case")*, Judgment of 9 April 1949, I.C.J. Reports 1949, p. 22.

[45] Jean Pictet, *The Fundamental Principles of the Red Cross Proclaimed by the Twentieth International Conference of the Red Cross, Vienna, 1965: Commentary* (Geneva, Henry Dunant Institute, 1979), pp. 21–27; also available from www.icrc.org.

[46] Oslo Guidelines, para.20; Mohonk Criteria, p. 196.

[47] *Ibid.*

[48] See Claude Pilloud et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: International Committee of the Red Cross, 1987), paragraph 2800–2801 (citing the "Proclamation of the Fundamental Principles of the Red Cross", adopted by resolution IX of the 20th International Conference of the Red Cross, Vienna 1965), and Pictet, *Commentary*, pp. 33–51.

urgent need".[49] As a whole, the principle of impartiality requires that responses to disasters be directed towards full respect and fulfilment of the needs of those affected by disasters in a manner that gives priority to the needs of the particularly vulnerable.

(6) The principle of non-discrimination reflects the inherent equality of all persons and the determination that no adverse distinction may be drawn between them. Prohibited grounds for discrimination are non-exhaustive, and include ethnic origin, sex, nationality, political opinions, race, and religion.[50] The Commission determined that non-discrimination should be referred to as an autonomous principle in light of its importance to the topic at hand. Such an approach has also been taken by the Institute of International Law in its 2003 resolution on humanitarian assistance, which stipulates that the offer and distribution of humanitarian assistance shall occur "without any discrimination on prohibited grounds".[51] The IFRC Guidelines likewise specify that assistance be provided to disaster-affected persons without "any adverse distinction (such as in regards to nationality, race, ethnicity, religious beliefs, class, gender, disability, age, and political opinions)".[52]

(7) The Commission noted that the principle of non-discrimination is not to be taken as excluding the prospect of "positive discrimination" as appropriate. The phrase "while taking into account the needs of the particularly vulnerable" in draft article 7 [6] reflects this position. The Commission considered the term "vulnerable" to encompass both groups and individuals. For this reason the neutral expression "vulnerable" was preferred to a reference either to "groups" or to "persons". The qualifier "particularly" was adopted by the Commission in recognition of the fact that those affected by disaster are by definition vulnerable. The specific phrasing of "particularly vulnerable" is drawn from article 4, paragraph 3 (a) of the IFRC Guidelines, which refer to the special needs of "women and particularly vulnerable groups, which may include children, displaced persons, the elderly, persons with disabilities, and persons living with HIV and other debilitating illnesses".[53] The qualifier is also mirrored in the Resolution on humanitarian assistance adopted by the Institute of International Law, which refers to the requirement to take into account the needs of the "most vulnerable".[54]

Article 8 [5]
Duty to cooperate

In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, and with the United Nations and other competent intergovernmental organizations, the International Federation of the Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organizations.

[49] Peter MacAlister-Smith, *Draft international guidelines for humanitarian assistance operations* (Heidelberg, Germany: Max Planck Institute for Comparative Public Law and International Law, 1991), para. 6 (a).

[50] See inter alia the 1949 Geneva Conventions, common art. 3, para. 1; Universal Declaration of Human Rights, General Assembly resolution 217 (III) of 10 December 1948, art. 2; International Covenant on Civil and Political Rights, art. 2, para. 1; International Covenant on Economic, Social and Cultural Rights, art. 2, para. 2.

[51] Resolution on Humanitarian Assistance, art. II, para. 3.

[52] IFRC Guidelines, 2007, art. 4, para. 2 (b).

[53] *Ibid.*, art. 4, para. 3 (a).

[54] Resolution on humanitarian assistance, art. II, para. 3.

Commentary

(1) Effective international cooperation is indispensable for the protection of persons in the event of disasters. The duty to cooperate is well established as a principle of international law and can be found in numerous international instruments. The Charter of the United Nations enshrines it, not least with reference to the humanitarian context in which the protection of persons in the event of disasters places itself. Article 1 (3) of the Charter clearly spells out as one of the purposes of the Organization:

> "To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."

Articles 55 and 56 of the Charter elaborate on Article 1 (3) with respect to international cooperation. Article 55 of the Charter reads:

> "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> "a. higher standards of living, full employment, and conditions of economic and social progress and development;
>
> "b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
>
> "c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

Article 56 of the Charter reads:

> "All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

The general duty to cooperate was reiterated as one of the principles of international law in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations in the following terms:

> "States have the duty to cooperate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international cooperation free from discrimination based on such differences."[55]

(2) Cooperation takes on special significance with regard to international human rights law. The International Covenant on Economic, Social and Cultural Rights refers explicitly to international cooperation as a means of realizing the rights contained therein.[56] This has been reiterated by the Committee on Economic, Social and Cultural Rights in its general comments relating to the implementation of specific rights guaranteed by the Covenant.[57] International cooperation gained particular prominence in the 2006 Convention on the

[55] General Assembly resolution 2625 (XXV) of 24 October 1970, annex, para. 1.

[56] General Assembly resolution 2200 A (XXI), annex, arts. 11, 15, 22 and 23.

[57] See, in particular, general comments No. 2 (E/1990/23), No. 3 (E/1991/23), No. 7 (E/1998/22), No. 14 (E/C.12/2000/4) and No. 15 (E/C.12/2002/11).

Rights of Persons with Disabilities which is, inter alia, applicable "in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters".[58]

(3) With regard to cooperation in the context of disaster relief and assistance, the General Assembly recognized, in resolution 46/182, that:

> "[t]he magnitude and duration of many emergencies may be beyond the response capacity of many affected countries. International cooperation to address emergency situations and to strengthen the response capacity of affected countries is thus of great importance. Such cooperation should be provided in accordance with international law and national laws ..."[59]

In addition, there exist a vast number of instruments of specific relevance to the protection of persons in the event of disasters which demonstrate the importance of the imperative of international cooperation in combating the effects of disasters. Not only are these instruments in themselves expressions of cooperation, they generally reflect the principle of cooperation relating to specific aspects of disaster governance in the text of the instrument. Typically in bilateral agreements, this has been reflected in the title given to the instrument, denoting either cooperation or (mutual) assistance.[60] Moreover, the cooperation imperative, in the vast majority of cases, is framed as one of the objectives of the instrument or is attributed positive effects towards their attainment. Again, the Tampere Convention is of relevance in this respect as it indicates in paragraph 21 of its preamble that the parties wish "to facilitate international cooperation to mitigate the impact of disaster". Another example can be found in an agreement between France and Malaysia:

> "Convinced of the need to develop cooperation between the competent organs of both Parties in the field of the prevention of grave risks and the protection of populations, property and the environment ..."[61]

(4) Cooperation should, however, not be interpreted as diminishing the prerogatives of a sovereign State within the limits of international law, as provided for in draft article 12 [9], paragraph 2. Furthermore, the principle of cooperation is to be understood also as being complementary to the primary duty of the authorities of the affected State to take care of the persons affected by natural disasters and similar emergencies occurring on its territory (draft article 12 [9], paragraph 1).[62]

(5) A key feature of activity in the field of disaster relief assistance is international cooperation not only among States, but also with international and non-governmental organizations. The importance of their role has been recognized for some time. In resolution 46/182 of 19 December 1991, the General Assembly confirmed that:

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[58] General Assembly resolution 61/106 of 13 December 2006, annex I, art. 11.

[59] Annex, para. 5.

[60] See A/CN.4/590/Add.2 for a comprehensive list of relevant instruments. For a further typology of instruments for the purposes of international disaster response law, see H. Fischer, "International disaster response law treaties: trends, patterns, and lacunae" in IFRC, *International disaster response laws, principles and practice: reflections, prospects and challenges* (2003), at pp. 24–44.

[61] Agreement between the Government of the French Republic and the Government of Malaysia on Cooperation in the Field of Disaster Prevention and Management and Civil Security, 25 May 1998, preambular paragraph 4.

[62] Resolution 46/182 of 19 December 1991, annex, para. 4. See also Hyogo Declaration, 2005, A/CONF.206/6 and Corr.1, chap. 1, resolution 1, para. 4.

> "... [i]ntergovernmental and non-governmental organizations working impartially and with strictly humanitarian motives should continue to make a significant contribution in supplementing national efforts."[63]

In a resolution adopted in 2008, the Economic and Social Council recognized,

> "... the benefits of engagement of and coordination with relevant humanitarian actors to the effectiveness of humanitarian response, and encourage[d] the United Nations to continue to pursue efforts to strengthen partnerships at the global level with the International Red Cross and Red Crescent Movement, relevant humanitarian non-governmental organizations and other participants of the Inter-Agency Standing Committee."[64]

(6) Draft article 8 [5] recognizes the central importance of international cooperation to international disaster relief and assistance activities. It establishes a legal obligation for the various parties concerned. It was understood, however, that the nature of the obligation of cooperation may vary, depending on the actor and the context in which assistance is being sought and offered. By its nature, cooperation is reciprocal, so that a duty for a State to cooperate with an international organization, for example, implies the same duty on the part of the organization. It was found that attempting to distinguish cooperation between States, and that between States and international organizations (particularly the United Nations), the International Federation of the Red Cross and Red Crescent Societies, and that with "relevant non-governmental organizations", did not adequately capture the range of possible legal relationships between States and the various entities mentioned in the provision. The nature of the legal obligation to cooperate is dealt with in specific provisions (hence the opening phrase "[i]n accordance with the present draft articles"), particularly draft articles 9 [5 *bis*] and 10 [5 *ter*]. The Commission inserted the phrase "as appropriate" which qualifies the entire draft article, by serving both as a reference to existing specific rules on cooperation between the various entities mentioned in the draft article (including those such rules to be added to the draft articles in the future) which establish the nature of the obligation to cooperate, and as an indication of a degree of latitude in determining, on the ground, when cooperation is or is not "appropriate".

(7) The qualifier "competent" before "intergovernmental organizations" was included as an indication that, for purposes of the draft articles, cooperation would only be necessary with those entities that are involved in the provision of disaster relief and assistance. A reference to the International Committee of the Red Cross is included as a consequence of the fact that the draft articles may also apply in complex emergencies involving armed conflict.

Article 9 [5 *bis*]
Forms of cooperation

> For the purposes of the present draft articles, cooperation includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, equipment and goods, and scientific, medical and technical resources.

Commentary

(1) Draft article 9 [5 *bis*] seeks to clarify the various forms which cooperation between affected States, assisting States, and other assisting actors may take in the context of the

[63] Annex, para. 5.
[64] Resolution 2008/36 of 25 July 2008, para. 7.

protection of persons in the event of disasters. Cooperation is enshrined in general terms in draft article 8 [5] as a guiding principle and fundamental duty with regard to the present topic, as it plays a central role in disaster relief efforts. The essential role of cooperation lends itself to a more detailed enunciation of the kinds of cooperation relevant in this context. The present draft article is therefore designed to further elaborate on the meaning of draft article 8 [5], without creating any additional legal obligations.

(2) The list of forms of cooperation in draft article 9 [5 *bis*] — humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, relief equipment and goods, and scientific, medical and technical resources — is loosely based on the second sentence of paragraph 4 of article 17 of the articles on the law of transboundary aquifers, which expands upon the general obligation to cooperate in article 7 of those draft articles by describing the cooperation necessary in emergency situations.[65] The second sentence of paragraph 4 of article 17 reads:

> "Cooperation may include coordination of international emergency actions and communications, making available emergency response personnel, emergency response equipment and supplies, scientific and technical expertise and humanitarian assistance."[66]

As this provision had been specifically drafted with reference to a related context — namely, the need for cooperation in the event of an emergency affecting a transboundary aquifer — the Commission felt that its language was a useful starting point for the drafting of draft article 9 [5 *bis*]. However, the text of article 9 [5 *bis*] was tailored to appropriately reflect the context and purpose of the present draft articles, and to ensure that it took into account the major areas of cooperation dealt with in international instruments addressing disaster response. Similar language is contained in the ASEAN Declaration on Mutual Assistance on Natural Disasters, of 26 June 1976, which states that "Member Countries shall, within their respective capabilities, cooperate in the improvement of communication channels among themselves as regards disaster warnings, exchange of experts and trainees, exchange of information and documents, and dissemination of medical supplies, services and relief assistance."[67] In a similar vein, in explaining the areas in which it would be useful for the United Nations to adopt a coordinating role and encourage cooperation, General Assembly resolution 46/182 calls for coordination with regards to "specialized personnel and teams of technical specialists, as well as relief supplies, equipment, and services …".[68]

(3) The beginning of draft article 9 [5 *bis*] states that the forms of cooperation are outlined "[f]or the purposes of the present draft articles." Therefore, draft article 9 [5 *bis*], which is to be read in light of the other draft articles, is oriented towards the purpose of the topic as a whole as stated in draft article 2 [2], namely, "to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights." In the context of the present topic, the ultimate goal of the duty to cooperate, and therefore of any of the forms of cooperation referred to in draft article 9 [5 *bis*], is the protection of persons affected by disasters.

(4) While the draft article highlights specific forms of cooperation, the list is not meant to be exhaustive, but is instead illustrative of the principal areas in which cooperation may be appropriate according to the circumstances. The non-exhaustive nature of the list is emphasized by the use of the word "includes", and its equivalent in the other official languages. The Commission determined that the highlighted forms are the main areas in

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[65] General Assembly resolution 63/124 of 11 December 2008, annex.

[66] *Ibid.*

[67] ASEAN Documents Series 1976.

[68] Para. 27.

which cooperation may be warranted, and that the forms are broad enough to encapsulate a wide variety of cooperative activities. Cooperation may, therefore, include the activities mentioned, but is not limited to them; other forms of cooperation not specified in the present draft article are not excluded, such as financial support; technological transfer covering, among others, satellite imagery; training; information-sharing and joint simulation exercises and planning.

(5) As draft article 9 [5 *bis*] is illustrative of possible forms of cooperation, it is not intended to create additional legal obligations for either affected States or other assisting actors to engage in certain activities. The forms which cooperation may take will necessarily depend upon a range of factors, including, inter alia, the nature of the disaster, the needs of the affected persons, and the capacities of the affected State and other assisting actors involved. As with the principle of cooperation itself, the forms of cooperation in draft article 9 [5 *bis*] are meant to be reciprocal in nature, as cooperation is not a unilateral act, but rather one that involves the collaborative behaviour of multiple parties.[69] The draft article is therefore not intended to be a list of activities in which an assisting State may engage, but rather areas in which harmonization of efforts through consultation on the part of both the affected State and other assisting actors may be appropriate.

(6) Moreover, cooperation in the areas mentioned must be in conformity with the other draft articles. For example, as with draft article 8 [5], the forms of cooperation touched upon in draft article 9 [5 *bis*] must be consistent with draft article 12 [9], which grants the affected State, "by virtue of its sovereignty", the primary role in disaster relief assistance. Cooperation must also be in accordance with the requirement of consent of the affected State to external assistance (draft article 14 [11]), as well as the recognition that the affected State may place appropriate conditions on the provision of external assistance, particularly with respect to the identified needs of persons affected by a disaster and the quality of the assistance (draft article 15 [13]). Cooperation is also related to draft article 17 [14], which recognizes the role of the affected State in facilitation of prompt and effective assistance to persons affected by a disaster. As such, and since draft article 9 [5 *bis*] does not create any additional legal obligations, the relationship between the affected State, assisting State, and other assisting actors with regards to the abovementioned forms of cooperation will be regulated in accordance with the other provisions of the present draft articles.

(7) Humanitarian assistance is intentionally placed first among the forms of cooperation mentioned in draft article 9 [5 *bis*], as the Commission considers this type of cooperation of paramount importance in the context of disaster relief. The second category — coordination of international relief actions and communications — is intended to be broad enough to cover most cooperative efforts in the disaster relief phase, and may include the logistical coordination, supervision, and facilitation of the activities and movement of disaster response personnel and equipment and the sharing and exchange of information pertaining to the disaster. Though information exchange is often referred to in instruments that emphasize cooperation in the pre-disaster phase as a preventive mode to reduce the risk of disasters,[70] communication and information is also relevant in the disaster response phase to monitor the developing situation and to facilitate the coordination of relief actions amongst the various actors involved. A number of instruments deal with communication and information sharing in the disaster relief context.[71] The mention of "making available relief

[69] See commentary to draft article 8 [5], para. (6).

[70] See, e.g., ASEAN Agreement, art. 18, para. 1.

[71] See, e.g., Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, United Nations, *Treaty Series*, vol. 2296, p. 5 ("Tampere Convention"), art. 3 (calling for "the deployment of terrestrial and satellite telecommunication equipment to predict, monitor and provide information concerning natural hazards and disasters," and

personnel, relief equipment and goods, and scientific, medical and technical resources" refers to the provision of any and all resources necessary for disaster response operations. The reference to "personnel" may entail the provision of and cooperation between medical teams, search and rescue teams, engineers and technical specialists, translators and interpreters, or other persons engaged in relief activities on behalf of one of the relevant actors – affected State, assisting State, or other assisting actors. The term "resources" covers scientific, technical, and medical expertise and knowledge as well as equipment, tools, medicines, or other objects that would be useful for relief efforts.

(8) Draft article 9 [5 *bis*] presents a list of the possible forms of cooperation in the disaster response, or post-disaster, phase. Cooperation in the pre-disaster phase, including disaster prevention, preparedness, and mitigation is dealt with in draft article 10 [5 *ter*].

Article 10 [5 *ter*]
Cooperation for disaster risk reduction

Cooperation shall extend to the taking of measures intended to reduce the risk of disasters.

Commentary

(1) While draft article 9 [5 *bis*] concerns the various forms which cooperation may take in the disaster relief or post-disaster phase of the disaster cycle, draft article 10 [5 *ter*] indicates that the scope of application *ratione temporis* of the duty to cooperate, enshrined in general terms in draft article 8 [5], also covers the pre-disaster phase. Thus, while draft article 9 [5 *bis*] deals with the response to a disaster, draft article 10 [5 *ter*] addresses the reduction of disaster risk.

(2) This provision qualifies the cooperation referred to as being related to the "taking of measures intended to reduce the risk of disasters". This phrase is to be understood in the light of both paragraphs of draft article 11 [16], in particular its paragraph 2 which envisages a series of measures that are specifically aimed at the reduction of disaster risk.

(3) Draft article 10 [5 *ter*] has been adopted without prejudice to its final location in the set of draft articles, including, in particular, its being incorporated at the same time as draft article 9 [5 *bis*], into a newly revised draft article 8 [5]. These are matters that have been left to the second reading of the draft articles.

Article 11 [16]
Duty to reduce the risk of disasters

1. Each State shall reduce the risk of disasters by taking the necessary and appropriate measures, including through legislation and regulations, to prevent, mitigate, and prepare for disasters.

2. Disaster risk reduction measures include the conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems.

"the sharing of information about natural hazards, health hazards and disasters among the States Parties and with other States, non-State entities and intergovernmental organizations, and the dissemination of such information to the public, particularly to at-risk communities"); Oslo Guidelines, para. 54. See also discussion in Secretariat Memorandum, A/CN.4/590, paras. 159–72.

Commentary

(1) Draft article 11 [16] deals with the duty to reduce the risk of disasters. The draft article is composed of two paragraphs. Paragraph 1 establishes the basic obligation to reduce the risk of disasters by taking certain measures, and paragraph 2 provides an indicative list of such measures.

(2) Draft article 11 [16] represents the acknowledgement of the need to cover in the draft articles on Protection of Persons in the Event of Disasters, not only the response phase of a disaster, but also the pre-disaster duties of States. The concept of disaster risk reduction has its origins in a number of General Assembly resolutions and has been further developed through the 1994 World Conference on Natural Disaster Reduction in Yokohama,[72] the 2005 Hyogo Framework for Action 2005–2015,[73] and several sessions of the Global Platform for Disaster Risk Reduction.

(3) As stated in the 2005 Hyogo Declaration: "a culture of disaster prevention and resilience, and associated pre-disaster strategies, which are sound investments, must be fostered at all levels, ranging from the individual to the international levels … Disaster risks, hazards and their impacts pose a threat, but appropriate response to this can and should lead to actions to reduce risks and vulnerabilities in the future". At the fourth session of the Global Platform for Disaster Risk Reduction in 2013, the concluding summary by the Chair drew attention to the "growing recognition that the prevention and reduction of disaster risk is a legal obligation, encompassing risks assessments, the establishment of early warning systems, and the right to access risk information".

(4) The rule embodied in draft article 11 [16] draws inspiration from among the sources of law identified by Article 38, paragraph 1, of the Statute of the International Court of Justice. The Commission bases itself on the fundamental principles of State sovereignty and non-intervention and, at the same time, draws on principles emanating from international human rights law, including the States' obligation to respect, protect, and fulfil human rights, in particular the right to life. Protection not only relates to actual violations of human rights but also entails an affirmative obligation on States to take the necessary and appropriate measures which are designed to prevent the occurrence of such violations, no matter the source of the threat. This is confirmed by the decisions of international tribunals, notably the European Court of Human Rights judgments in the *Öneryildiz v. Turkey*[74] and *Budayeva and Others v. Russia*[75] cases, which affirmed the duty to take preventive measures. In addition, draft article 11 [16] draws from a number of international environmental law principles, including the "due diligence" principle.

(5) An important legal foundation for draft article 11 [16] is the widespread practice of States reflecting their commitment to reduce the risk of disasters. Many States have entered into multilateral, regional and bilateral agreements concerned with reducing the risk of disasters, including: the ASEAN Agreement;[76] the Beijing Action for Disaster Risk Reduction in Asia (2005); the Delhi Declaration on Disaster Risk Reduction in Asia (2007);

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[72] See Yokohama Strategy for a Safer World: Guidelines for Natural Disaster Prevention, Preparedness and Mitigation and Plan of Action, A/CONF.172/9, chap. I, resolution I, annex I.

[73] Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters ("Hyogo Framework for Action"), A/CONF.206/6 and Corr.1, chap. I, resolution 2.

[74] European Court of Human Rights, *Öneryildiz v. Turkey*, Case No. 48939, Grand Chamber, Judgment, 30 November 2004.

[75] European Court of Human Rights, *Budayeva and Others v. Russia*, Chamber (First Section), Case Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment, 20 March 2008.

[76] The Agreement is the first international treaty concerning disaster risk reduction to have been developed after the adoption of the Hyogo Framework for Action.

the Kuala Lumpur Declaration on Disaster Risk Reduction in Asia (2008); the 2010 Fourth Asian Ministerial Conference on Disaster Risk Reduction, leading to the Incheon Declaration on Disaster Risk Reduction in Asia and the Pacific 2010, the Incheon Regional Roadmap and Action Plan on Disaster Risk Reduction through Climate Change Adaptation in Asia and the Pacific, reaffirming the Framework for Action and proposing Asian initiatives for climate change adaptation and disaster risk reduction considering vulnerabilities in the region;[77] the African Union Africa Regional Strategy for Disaster Risk Reduction of 2004, which was followed by a programme of action for its implementation (originally for the period 20052010, but later extended to 2015);[78] four sessions of the African Regional Platform for Disaster Risk Reduction, the most recent in 2013;[79] the Arab Strategy for Disaster Risk Reduction 2020, adopted by the Council of Arab Ministers Responsible for the Environment at its twenty-second session, in December 2010;[80] and, lastly, the Nayarit Communiqué on Lines of Action to Strengthen Disaster Risk Reduction in the Americas (2011).[81]

(6) Recognition of this commitment is further shown by the incorporation by States of disaster risk reduction measures into their national policies and legal frameworks. A compilation of national progress reports on the implementation of the Hyogo Framework[82] indicates that 64 States or areas reported having established specific policies on disaster risk reduction, evenly spread throughout all continents and regions, including the major hazard-prone locations. They are: Algeria, Anguilla, Argentina, Armenia, Bangladesh, Bolivia (Plurinational State of), Brazil, British Virgin Islands, Canada, Cape Verde, Chile, Colombia, Cook Islands, Costa Rica, Côte d'Ivoire, Cuba, Dominican Republic, Fiji, Finland, Georgia, Germany, Ghana, Guatemala, Honduras, India, Indonesia, Italy, Japan, Kenya, Lao People's Democratic Republic, Lebanon, Madagascar, Malawi, Malaysia, Maldives, Marshall Islands, Mauritius, Mexico, Mongolia, Morocco, Mozambique, Nepal, New Zealand, Nicaragua, Nigeria, Norway, Panama, Paraguay, Peru, Poland, Saint Kitts and Nevis, Saint Lucia, Samoa, Senegal, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Thailand, The former Yugoslav Republic of Macedonia, United Republic of Tanzania, United States, Vanuatu and Venezuela (Bolivarian Republic of). More recently, the United Nations International Strategy for Disaster Reduction (UNISDR) has identified 76 States that have adopted national platforms, defined as a "coordinating mechanism for mainstreaming disaster risk reduction into development policies, planning and programmes", to implement disaster risk reduction strategies.[83] Several countries have adopted legislation specifically addressing disaster risk reduction either as stand-alone legislation or as part of a broader legal framework concerning both disaster risk management and disaster response, including: Algeria,[84] Cameroon,[85] China,[86] the

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[77] For the text of the Declaration, see http:://www.preventionweb.net/files/16327_finalincheondeclaration1028.pdf.

[78] Extended Programme of Action for the Implementation of the Africa Regional Strategy for Disaster Risk Reduction (2006–2015), Introduction.

[79] UNISDR, "Africa seeks united position on disaster risk reduction", 13 February 2013. Available from http://www.unisdr.org/archive/31224.

[80] For the text of the Strategy, see http://www.unisdr.org/files/18903_17934asdrrfinalenglishjanuary20111.pdf.

[81] For the text of the Communiqué, see http://www.unisdr.org/files/18603_communiquenayarit.pdf.

[82] Hyogo Framework for Action, priority 1, core indicator 1.1.

[83] For a list of States that have adopted national platforms, see http://www.unisdr.org/partners/countries.

[84] Algeria, Risk Prevention and Disaster Management Act of 25 December 2004.

[85] Cameroon, Arrêté No. 037/PM du 19 mars 2003 portant création, organisation et fonctionnement d'un Observatoire National des Risques.

[86] China, Disaster Prevention and Response Act (2002).

Dominican Republic,[87] El Salvador,[88] Estonia,[89] France,[90] Guatemala,[91] Haiti,[92] Hungary,[93] India,[94] Indonesia,[95] Italy,[96] Madagascar,[97] Namibia,[98] New Zealand,[99] Pakistan,[100] Peru,[101] the Philippines,[102] the Republic of Korea,[103] Slovenia,[104] South Africa,[105] Thailand[106] and the United States.[107]

(7) Draft article 11 [16] is to be read together with the rules of general applicability adopted thus far, including those principally concerned with the response to a disaster.

Paragraph 1

(8) Paragraph 1 starts with the words "Each State". The Commission opted for this formula over "States" for the sake of consistency with the draft articles previously adopted, where care had been taken to identify the State or States which bore the legal duty to act. In contrast to those draft articles dealing directly with disaster response where a distinction exists between an affected State or States and other States, in the pre-disaster phase the obligation in question applies to every State. Furthermore as is evident from paragraph 2, the obligation to reduce risk implies measures primarily taken at the domestic level. Any such measures requiring interaction between States or with other assisting actors are meant to be covered by article 10 [5 *ter*]. In other words, the obligation applies to each State individually. Hence the Commission decided against using the word "States" also to avoid any implication of a collective obligation.

(9) The word "shall" signifies the existence of the international legal obligation to act in the manner described in the paragraph and is the most succinct way to convey the sense of

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87 Dominican Republic, Decree No. 874-09 approving the Regulation for the application of Law No. 147-02 on Risk Management and repealing Chapters 1, 2, 3, 4 and 5 of Decree No. 932-03 (2009).

88 El Salvador, Law on Civil Protection, Disaster Prevention and Disaster Mitigation (2005).

89 Estonia, Emergency Preparedness Act (2000).

90 France, Law No. 2003-699 regarding the prevention of technological and natural risks and reparation of damages (2003).

91 Guatemala, Decree No. 109-96, Law on the National Coordinator for the Reduction of Natural or Man-made Disasters (1996).

92 Haiti, National Risk and Disaster Management Plan (1988).

93 Hungary, Act LXXIV on the management and organization for the prevention of disasters and the prevention of major accidents involving dangerous substances (1999).

94 India, Disaster Management Act, No. 53 (2005).

95 Indonesia, Law No. 24 of 2007 Concerning Disaster Management.

96 Italy, Decree of the Prime Minister to establish a national platform for disaster risk reduction (2008).

97 Madagascar, Decree No. 2005-866 setting out the manner of application of Law No. 2003-010 of 5 September 2003 on the national risk and disaster management policy (2005).

98 Namibia, Disaster Risk Management Act (2012).

99 New Zealand, National Civil Defence Emergency Management Plan Order 2005 (SR 2005/295), part 3.

100 Pakistan, National Disaster Management Act (2010). See also the official statement of the Government of Pakistan at the third session of the Global Platform for Disaster Risk Reduction, in 2011, available from http://www.preventionweb.net/files/globalplatform/pakistanofficialstatement.pdf.

101 Peru, Law No. 29664 creating the National System for Disaster Risk Management (2011).

102 The Philippines, Philippine Disaster Risk Management Act (2006).

103 Republic of Korea, National Disaster Countermeasures Act (1995); National Disaster Management Act (2010).

104 Slovenia, Act on the Protection against Natural and Other Disasters (2006).

105 South Africa, Disaster Management Act No. 57 of 2002.

106 Thailand, Disaster Prevention and Mitigation Act (2007).

107 United States, Disaster Mitigation Act (2000).

that legal obligation. This is confirmed by the title of the draft article, which refers to the "duty" to reduce the risk of disasters. While each State bears the same obligation, the question of different levels of capacity among States to implement the obligation is dealt with under the phrase "by taking the necessary and appropriate measures".

(10) The obligation is to "reduce the risk of disasters".[108] The Commission adopted the present formula in recognition of the fact that the contemporary view of the international community, as reflected in several major pronouncements, most recently in the Hyogo Declaration issued at the 2005 World Conference on Disaster Reduction, was that the focus should be placed on the reduction of the risk of harm caused by a hazard, as distinguished from the prevention of disasters themselves. Accordingly, the emphasis in paragraph 1 is placed on the reduction of the risk of disasters. This is achieved by taking certain measures so as to prevent, mitigate and prepare for such disasters.

(11) The phrase "by taking the necessary and appropriate measures" indicates the specific conduct being required. In addition to the further specification about legislation and regulations explained in paragraph (13) below, the "measures" to be taken are qualified by the words "necessary" and "appropriate" which accord with common practice. What might be "necessary and appropriate" in any particular case is to be understood in terms of the stated goal of the measures to be taken, namely "to prevent, mitigate, and prepare for disasters" so as to reduce risk. This is to be evaluated within the broader context of the existing capacity and availability of resources of the State in question, as has been noted in paragraph (8) above. The fundamental requirement of due diligence is inherent to the concept of "necessary and appropriate". It is further understood that the question of the effectiveness of the measures is implied in that formula.

(12) The paragraph indicates by means of the phrase "including through legislation and regulations", the specific context in which the corresponding measures are to be taken. The envisaged outcome consists of a number of concrete measures which are typically taken within the context of a legislative or regulatory framework. Accordingly, for those States which do not already have such a framework in place, the general obligation to reduce the risk of disasters would also include an obligation to put such a legal framework into place so as to allow for the taking of the "necessary and appropriate" measures. The phrase "legislation and regulations" is meant to be understood in broad terms to cover as many manifestations of law as possible, it being generally recognized that such law-based measures are the most common and effective way to facilitate (hence the word "through") the taking of disaster risk reduction measures at the domestic level.

(13) The qualifier "including" indicates that while "legislation and regulations" may be the primary methods, there may be other arrangements under which such measures could be taken. The word "including" was chosen in order to avoid the interpretation that the adoption and implementation of specific legislation and regulations would always be required. This allows a margin of discretion for each State to decide on the applicable legal framework, it being understood that having in place a legal framework which anticipates the taking of "the necessary and appropriate measures" is a sine qua non for disaster risk reduction. The use of the definite article "the" before "necessary", therefore, serves the function of specifying that it is not just any general measures which are being referred to, but rather, specific, and concrete, measures aimed at prevention, mitigation and preparation for disasters.

[108] The Commission notes the existence of a linguistic difference involving the United Nations official translation into French of the term "Disaster Risk Reduction" (DRR).

(14) The phrase "through the adoption of legislation and regulations" imports a reference to ensuring that mechanisms for implementation and accountability for non-performance be defined within domestic legal systems. Since such issues, though important, are not the only ones which could be the subject of legislation and regulations in the area of disaster risk reduction, singling them out in the text of paragraph 1 could have led to a lack of clarity.

(15) The last clause, namely "to prevent, mitigate, and prepare for disasters" serves to describe the purpose of the "necessary and appropriate" measures which States are to take during the pre-disaster phase, with the ultimate goal of reducing their exposure to the risk of disasters. The phrase tracks the now well-accepted formula used in major disaster risk reduction instruments. The Commission was cognizant of the fact that adopting a different formulation could result in unintended *a contrario* interpretations as to the kinds of activities being anticipated in the draft article.

(16) To illustrate the meaning of each of the three terms used, prevention, mitigation and preparedness, the Commission deems it appropriate to have recourse to the Terminology on Disaster Risk Reduction prepared by UNISDR in 2009,[109] according to which:

> (i) "Prevention is 'the outright avoidance of adverse impacts of hazards and related disasters'...
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> Prevention (i.e. disaster prevention) expresses the concept and intention to completely avoid potential adverse impacts through action taken in advance ... Very often the complete avoidance of losses is not feasible and the tasks transform to that of mitigation. Partly for this reason, the terms prevention and mitigation are sometimes used interchangeably in casual use;"
>
> (ii) "Mitigation is 'the lessening or limitation of the adverse impacts of hazards and related disasters' ...
>
> The adverse impacts of hazards often cannot be prevented fully, but their scale or severity can be substantially lessened by various strategies and actions ... It should be noted that in climate change policy 'mitigation' is defined differently, being the term used for the reduction of greenhouse gas emissions that are the source of climate change;"[110]
>
> (iii) "Preparedness is 'the knowledge and capacities developed by governments, professional response and recovery organizations, communities and individuals to effectively anticipate, respond to and recover from the impacts of likely, imminent or current hazard events or conditions' ...
>
> Preparedness action is carried out within the context of disaster risk management and aims to build the capacities needed to efficiently manage all types of emergencies and achieve orderly transitions from response through sustained recovery. Preparedness is based on a sound analysis of disaster risks and good linkages with early warning systems ... [The measures to be taken] must be supported by formal institutional, legal and budgetary capacities."

Paragraph 2

(17) Paragraph 2 lists three categories of disaster risk reduction measures, namely: the conduct of risk assessments, the collection and dissemination of risk and past loss

[109] See http://www.unisdr.org/we/inform/terminology.

[110] The Commission is conscious of the discrepancy in the concordance between the English and French versions of the official United Nations use of the term "mitigation".

information, and the installation and operation of early warning systems. As noted in paragraph (3), these three measures were singled out in the Chair's summary at the conclusion of the fourth session of the Global Platform for Disaster Risk Reduction held in May 2013. The Commission decided to refer expressly to the listed three examples as reflecting the most prominent types of contemporary disaster risk reduction efforts. The word "include" serves to indicate that the list is non-exhaustive. The listing of the three measures is without prejudice to other activities aimed at the reduction of the risk of disasters which are being undertaken at present, or which may be undertaken in the future.

(18) The practical measures that can be adopted are innumerable and depend on the social, environmental, financial, cultural, and other relevant circumstances. Practice in the public and private sectors provides a wealth of examples. Among them may be cited: community-level preparedness and education; the establishment of institutional frameworks; contingency planning; setting up of monitoring mechanisms; land-use controls; construction standards; ecosystems management; drainage systems; funding; and insurance.

(19) The three consecutive measures selected in paragraph 2 share a particular characteristic: they are instrumental to the development and applicability of many if not all other measures, for instance in decision-making, concerning definitions of priorities or investment planning, both in the public and the private sector.

(20) The first measure — risk assessments — is about generating knowledge concerning both hazards and vulnerabilities. As such, it is the first step towards any sensible measure to reduce the risk of disasters. Without a sufficiently solid understanding of the circumstances surrounding disasters and their characteristics, no effective measure can be enacted. Risk assessments also compel a closer look at local realities and the engagement of local communities.

(21) The second measure — the collection and dissemination of risk and past loss information — is the next step. Reducing disaster risk requires action by all actors in the public and private sectors and civil society. Collection and dissemination should result in the free availability of risk and past loss information, which is an enabler of effective action. It allows all stakeholders to assume responsibility for their actions and to make a better determination of priorities for planning purposes; it also enhances transparency in transactions and public scrutiny and control. The Commission wishes to emphasize the desirability of the dissemination and free availability of risk and past loss information, as it is the reflection of the prevailing trend focusing on the importance of public access to such information. The Commission, while recognizing the importance of that trend, felt that it was best dealt with in the commentary and not in the body of paragraph 2, since making it a uniform legal requirement could prove burdensome for States.

(22) The third measure concerns early warning systems, which are instrumental both in initiating and implementing contingency plans, thus limiting the exposure to a hazard; as such, they are a pre-requisite for effective preparedness and response.

(23) As it has been explained in paragraph (11), paragraph 2 concerns the taking of the envisaged measures within the State. Any inter-State component would be covered by the duty to cooperate in draft article 9 [5], read together with draft article 10 [5 *ter*]. Accordingly, the extent of any international legal duty relating to any of the listed and not listed measures that may be taken in order to reduce the risk of disasters is to be determined by way of the relevant specific agreements or arrangements each State has entered into with other actors with which it has the duty to cooperate.

Article 12 [9]
Role of the affected State

1. The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory.

2. The affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance.

Commentary

(1) Draft article 12 [9] is addressed towards an affected State in the context of the protection of persons in the event of a disaster upon its territory. Paragraph 1 reflects the obligation of an affected State to protect persons and provide disaster relief in accordance with international law. Paragraph 2 affirms the primary role held by an affected State in the response to a disaster upon its territory, or a territory or area under its jurisdiction or control. As a whole, draft article 12 [9] is premised on the core principles of sovereignty and non-intervention, respectively, as enshrined in the Charter of the United Nations,[111] and recognized in numerous international instruments.[112] In the context of disaster relief, General Assembly resolution 46/182 affirms that "[t]he sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations".[113]

(2) Paragraph 1 affirms that the duty held by an affected State to ensure the protection of persons and the provision of disaster relief and assistance on its territory stems from its sovereignty. This conception of a bond between sovereign rights and concomitant duties upon a State was expressed by Judge Álvarez in a separate opinion in the Corfu Channel case:

> "By sovereignty, we understand the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States. Sovereignty confers rights upon States and imposes obligations on them."[114]

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[111] Charter of the United Nations, Art. 2, para. 1 ("The Organization is based on the principle of the sovereign equality of all its members"); Art. 2, para. 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII").

[112] See, e.g., the Declaration on Principles on International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV) of 24 October 1970, annex (noting inter alia that "[a]ll States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community", that "[t]he use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention", and that "States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention"). The International Court of Justice has held that "[b]etween independent States, respect for territorial sovereignty is an essential foundation of international relations"; *Corfu Channel case*, p. 35.

[113] General Assembly resolution 46/182, annex, para. 3.

[114] *Corfu Channel case*, Separate Opinion by Judge Álvarez, p. 43. See also the opinion expressed by Max Huber, Arbitrator, in the Island of Palmas case, Award of 4 April 1928, R.I.A.A., vol. II, p. 839 ("Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States …").

The Commission considered several formulations for this concept, including the phrases "in the exercise of its sovereignty" and "in the exercise of its sovereign rights and duties", before settling on the present text. The modifying phrase "by virtue of its sovereignty" emphasizes that the affected State, which benefits from the principle of non-intervention, is the party that holds the duty to protect persons located within its territory or within a territory or area under its jurisdiction or control. The Commission determined that the term "duty" was more appropriate than that of "responsibility". It considered that use of the term "responsibility" could give rise to confusion given its use as a term of art elsewhere in the Commission's work.

(3) Paragraph 2 further reflects the primary role held by a State in disaster response. This position is rooted in the core principles of State sovereignty and non-intervention at international law. For the reasons expressed above, the Commission decided to adopt the word "role" rather than "responsibility" in articulating the position of an affected State. The adoption of the term "role" was informed by General Assembly resolution 46/182, which affirms inter alia that an affected State "has the primary role in the initiation, organization, coordination, and implementation of humanitarian assistance within its territory".[115] Use of the word "role" rather than "responsibility" was also considered to allow a margin of appreciation to States in the coordination of disaster response activities. Language implying an obligation upon States to direct or control disaster response activities may conversely be restrictive on States that preferred to take a more limited role in disaster response coordination or faced a situation of limited resources.

(4) The primacy of an affected State is also informed by the long-standing recognition in international law that the government of a State is best placed to determine the gravity of an emergency situation and to frame appropriate response policies. The affirmation in paragraph 2 that an affected State holds the primary role in the direction, control, coordination and supervision of disaster relief and assistance should be read in concert with the duty of cooperation outlined in draft article 8 [5]. In this context, draft article 12 [9], paragraph 2, affirms that an affected State holds the primary position in cooperative relationships with other relevant actors that are contemplated in draft article 8 [5].

(5) Reference to the "direction, control, coordination and supervision" of disaster relief and assistance is drawn from article 4, paragraph 8 of the Tampere Convention on the Provision of Telecommunications Resources for Disaster Mitigation and Relief Operations.[116] The Commission considered that the Tampere Convention formula was gaining general currency in the field of disaster relief and assistance and represented a more contemporary construction.[117] The formula reflects the position that a State exercises final control over the manner in which relief operations are carried out in accordance with international law.

(6) The Commission departed from the Tampere Convention in deciding not to include a reference to "national law" in its articulation of the primary role of an affected State. In the context of the Tampere Convention, the reference to national law indicates that

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[115] General Assembly resolution 46/182, annex, para. 4.

[116] Tampere Convention (noting that "[n]othing in this Convention shall interfere with the right of a State Party, under its national law, to direct, control, coordinate and supervise telecommunication assistance provided under this Convention within its territory").

[117] See, e.g., the ASEAN Agreement, art. 3, para. 2 (noting that "[t]he Requesting or Receiving Party shall exercise the overall direction, control, co-ordination and supervision of the assistance within its territory"); the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, United Nations, *Treaty Series*, vol. 1457, p. 133, art. 3 (a) (noting inter alia that unless otherwise agreed, "the overall direction, control, co-ordination and supervision of the assistance shall be the responsibility within its territory of the requesting State").

appropriate coordination requires consistency with an affected State's domestic law. The Commission decided not to include this reference in light of the fact that the internal law of an affected State may not in all cases regulate or provide for the primary position of a State in disaster response situations.

Article 13 [10]
Duty of the affected State to seek external assistance

To the extent that a disaster exceeds its national response capacity, the affected State has the duty to seek assistance from among other States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations, as appropriate.

Commentary

(1) Draft article 13 [10] addresses the particular situation in which a disaster exceeds a State's national response capacity. In these circumstances an affected State has the duty to seek assistance from among other States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations. The duty expounded in draft article 13 [10] is a specification of draft article 12 [9] and draft article 8 [5]. Paragraph 1 of draft article 12 [9] stipulates that an affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory. The draft article affirms the central position of obligations owed by States towards persons within its borders. The duty to cooperate also underlies an affected State's duty to the extent that a disaster exceeds its national response capacity. Draft article 8 [5] affirms that the duty to cooperate is incumbent upon not only potential assisting States, but also affected States where such cooperation is appropriate. The Commission considers that such cooperation is both appropriate and required to the extent that an affected State's national capacity is exceeded. In these circumstances, seeking assistance is additionally an element of the fulfilment of an affected State's primary responsibilities under international human rights instruments and customary international law. The existence of the duty to seek assistance as set out in draft article 13 [10] was supported by a majority of the members of the Commission, but opposed by others.

(2) The draft article stresses that a duty to seek assistance arises only to the extent that the national response capacity of an affected State is exceeded. Not all disasters are considered to overwhelm a nation's response capacity. The Commission therefore considers the present draft article only to be applicable to a subset of disasters as defined in draft article 3 [3].

(3) It is to be noted that in the debate within the Commission concerning the formulation of draft article 13 [10], some members of the Commission opposed the idea that affected States are under, or should be placed under, a legal duty to seek external assistance in cases of disaster. This opposition was premised on the view that, as it currently stands, international law does not place any such binding duty upon affected States. The members of the Commission who shared this perspective indicated that draft article 13 [10] should be worded in hortatory terms to the effect that affected States "should" seek external assistance in cases where a disaster exceeds national response capacity.

(4) The Commission adopted the phrase "to the extent that" in order to clarify that the national response capacity of an affected State is rarely conceptualized as sufficient or insufficient in absolute terms. An affected State's national capacity may be exceeded in relation to one aspect of disaster relief operations, although the State remains capable of undertaking other operations. As a whole, the phrase "[t]o the extent that a disaster exceeds its national response capacity" encompasses the situation in which a disaster appears likely

to exceed an affected State's national response capacity. This flexible and proactive approach is in line with the fundamental purpose of the draft articles as expressed in draft article 2 [2]. The approach facilitates an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights. Recognition of the duty upon States in these circumstances reflects the Commission's concern to enable the provision of timely and effective disaster relief assistance.

(5) The Commission considers that the duty to seek assistance in draft article 13 [10] derives from an affected State's obligations under international human rights instruments and customary international law. Recourse to international support may be a necessary element in the fulfilment of a State's international obligations towards individuals where an affected State considers its own resources are inadequate to meet protection needs. While this may occur also in the absence of any disaster, a number of human rights are directly implicated in the context of a disaster, including the right to life, the right to food, the right to health and medical services, the right to the supply of water, the right to adequate housing, clothing and sanitation, and the right to be free from discrimination.[118] The Commission notes that the Human Rights Committee has held that a State's duty in the fulfilment of the right to life extends beyond mere respect to encompass a duty to protect and fulfil the substantive right.[119] The right to life is non-derogable under the International Covenant on Civil and Political Rights, even in the event of a "public emergency threatening the life of a nation"[120] – which has been recognized to include a "natural catastrophe" by the Human Rights Committee in General Comment No. 29.[121] The International Covenant on Economic, Social and Cultural Rights states that in pursuance of the right to food:

> "[t]he States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."[122]

The Committee on Economic, Social and Cultural Rights noted, in General Comment No. 12 on the Right to Adequate Food, that if a State party maintains that resource constraints make it impossible to provide access to food to those in need:

> "the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. [...] A State claiming that it is unable to carry out its obligation for reasons beyond its control therefore has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food".[123]

The Commission therefore notes that "appropria e steps" to be taken by a State include seeking international assistance where domestic conditions are such that the right to food cannot be realized. It is relevant that this step is engaged where a State itself asserts that it is unable to carry out its obligations.

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[118] See the examples listed in document A/CN.4/598, para. 26.

[119] See Human Rights Committee, General Comment No. 6 (The Right to Life), 30 April 1982, para. 5.

[120] International Covenant on Civil and Political Rights, 1966, art. 6 (1).

[121] Human Rights Committee, General Comment No. 29 (States of Emergency (art. 4)), 24 July 2001, para. 5.

[122] International Covenant on Economic, Social and Cultural Rights, 1966, art. 11.

[123] Committee on Economic, Social and Cultural Rights, General Comment No. 12 (The right to adequate food (art. 11)), 1999, para. 17.

(6) Specific references to the protection of rights in the event of disasters are made in the African Charter on the Rights and Welfare of the Child,[124] and the Convention on the Rights of Persons with Disabilities.[125] Under article 23 of the African Charter on the Rights and Welfare of the Child, States shall take "all appropriate measures" to ensure that children seeking or holding refugee status, as well as those who are internally displaced due to events including "natural disaster", are able to "receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties". The Convention on the Rights of Persons with Disabilities refers to the obligation of States towards disabled persons in the event of disasters:

> "States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters."[126]

The Commission considers that the phrase "all necessary measures" may encompass recourse to possible assistance from the international community in the event that an affected State's national capacity is exceeded. Such an approach would cohere with the guiding principle of humanity as applied in the international legal system. The International Court of Justice affirmed in the Corfu Channel case (merits) that elementary considerations of humanity are considered to be general and well-recognized principles of the international legal order, "even more exacting in peace than in war".[127] Draft article 7 [6] affirms the core position of the principle of humanity in disaster response.

(7) The Commission considers that a duty to "seek" assistance is more appropriate than a duty to "request" assistance in the context of draft article 13 [10]. The Commission derives this formulation from the duty outlined in the resolution on humanitarian assistance adopted by the Institute of International Law, which notes:

> "[w]henever the affected State is unable to provide sufficient humanitarian assistance to the victims placed under its jurisdiction or de facto control, it shall seek assistance from competent international organizations and/or from third States."[128]

Similarly, the IFRC Guidelines hold that:

> "[i]f an affected State determines that a disaster situation exceeds national coping capacities, it should seek international and/or regional assistance to address the needs of affected persons."[129]

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[124] African Charter on the Rights and Welfare of the Child, 1990, OAU Doc. CAB/LEG/24.9/49 (1990).

[125] United Nations Convention on the Rights of Persons with Disabilities, General Assembly resolution 61/106 of 13 December 2006, annex I.

[126] *Ibid.*, art. 11.

[127] *Corfu Channel case* p. 22 (noting that "[t]he obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war ...").

[128] Resolution on humanitarian assistance, art. III, para. 3.

[129] IFRC Guidelines, guideline 3 (2).

In addition, the guiding principles annexed to General Assembly resolution 46/182 also appear to support an implicit duty on affected States to engage in international cooperation where an emergency exceeds its response capacity:

> "The magnitude and duration of many emergencies may be beyond the response capacity of many affected countries. International cooperation to address emergency situations and to strengthen the response capacity of affected countries is thus of great importance. Such cooperation should be provided in accordance with international law and national laws."[130]

(8) The alternate formulation of "request" is incorporated in the Oslo Guidelines, which note that "[i]f international assistance is necessary, it should be requested or consented to by the Affected State as soon as possible upon the onset of the disaster to maximise its effectiveness".[131] The Commission considers that a "request" of assistance carries an implication that an affected State's consent is granted upon acceptance of that request by a third State. In contrast, the Commission is of the view that a duty to "seek" assistance implies a broader, negotiated approach to the provision of international aid. The term "seek" entails the proactive initiation by an affected State of a process through which agreement may be reached. Draft article 13 [10] therefore places a duty upon affected States to take positive steps actively to seek out assistance to the extent that a disaster exceeds its national response capacity.

(9) The Commission considers that the Government of an affected State will be in the best position to determine the severity of a disaster situation and the limits of its national response capacity. The Commission considers that the assessment of the severity of a disaster by an affected State must be carried out in good faith. The principle of good faith is expounded in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,[132] which stipulates that "[e]very State has the duty to fulfil in good faith" obligations assumed by it "in accordance with the Charter of the United Nations",[133] "obligations under the generally recognized principles and rules of international law",[134] and "obligations under international agreements valid under the generally recognized principles and rules of international law".[135] A good faith assessment of the severity of a disaster is an element of an affected State's duty, by virtue of its sovereignty, to ensure the protection of persons and provision of disaster relief and assistance on its territory pursuant to draft article 12 [9], paragraph 1.

(10) The phrase "as appropriate" was adopted by the Commission to emphasize the discretionary power of an affected State to choose from among various States, the United Nations, competent intergovernmental organizations, and relevant non-governmental organizations the assistance that is most appropriate to its specific needs. The term further reflects that the duty to seek assistance does not imply that a State is obliged to seek assistance from every source listed in draft article 13 [10]. The phrase "as appropriate" therefore reinforces the fact that an affected State has the primary role in the direction, control, coordination and supervision of the provision of disaster relief and assistance, as outlined in draft article 12 [9], paragraph 2.

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[130] General Assembly resolution 46/182, annex, para. 5.
[131] Oslo Guidelines, para. 58.
[132] General Assembly resolution 2625 (XXV), annex.
[133] *Ibid.*
[134] *Ibid.*
[135] *Ibid.*

(11) The existence of a duty to seek assistance to the extent that national capacity is exceeded should not be taken to imply that the Commission does not encourage affected States to seek assistance in disaster situations of a lesser magnitude. The Commission considers cooperation in the provision of assistance at all stages of disaster relief to be central to the facilitation of an adequate and effective response to disasters, and a practical manifestation of the principle of solidarity. Even if an affected State is capable and willing to provide the required assistance, cooperation and assistance by international actors will in many cases ensure a more adequate, rapid and extensive response to disasters and an enhanced protection of affected persons.

Article 14 [11]
Consent of the affected State to external assistance

1. The provision of external assistance requires the consent of the affected State.

2. Consent to external assistance shall not be withheld arbitrarily.

3. When an offer of assistance is extended in accordance with the present draft articles, the affected State shall, whenever possible, make known its decision regarding the offer.

Commentary

(1) Draft article 14 [11] addresses consent of an affected State to the provision of external assistance. As a whole, it creates for affected States a qualified consent regime in the field of disaster relief operations. Paragraph 1 reflects the core principle that implementation of international relief assistance is contingent upon the consent of the affected State. Paragraph 2 stipulates that consent to external assistance shall not be withheld arbitrarily, while paragraph 3 places a duty upon an affected State to make known its decision regarding an offer of assistance whenever possible.

(2) The principle that the provision of external assistance requires the consent of the affected State is fundamental to international law. Accordingly, paragraph 3 of the guiding principles annexed to General Assembly resolution 46/182 notes that "humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country".[136] The Tampere Convention stipulates that "[n]o telecommunication assistance shall be provided pursuant to this Convention without the consent of the requesting State Party",[137] while the ASEAN Agreement on Disaster Management notes that "external assistance or offers of assistance shall only be provided upon the request or with the consent of the affected Party".[138] Recognition of the requirement of State consent to the provision of external assistance comports with the recognition in draft article 12 [9], paragraph 2, that an affected State has the primary role in the direction, control, coordination and supervision of disaster relief and assistance on its territory.

(3) The recognition, in paragraph 2, that an affected State's right to refuse an offer is not unlimited reflects the dual nature of sovereignty as entailing both rights and obligations. This approach is reflected in paragraph 1 of draft article 12 [9], which affirms that an affected State, "by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory". On the other hand, some members of the Commission resisted the idea that the dual nature of sovereignty necessarily meant that the Commission should support the approach taken in draft article 14 [11],

[136] General Assembly resolution 46/182, annex, para. 3.
[137] Tampere Convention, art. 4, para. 5.
[138] ASEAN Agreement, art. 3, para. 1.

paragraph 2. For these members of the Commission, draft article 14 [11], paragraph 2, should not be drafted to include the mandatory "shall"; rather, the provision should indicate that "Consent to external assistance should not be withheld arbitrarily."

(4) The Commission considers that the duty of an affected State to ensure protection and assistance to those within its territory in the event of a disaster is aimed at preserving the life and dignity of the persons affected by the disaster and guaranteeing the access of persons in need to humanitarian assistance. This duty is central to securing the right to life of those within an affected State's territory.[139] The Human Rights Committee has interpreted the right to life as embodied in article 6 of the International Covenant of Civil and Political Rights to contain the obligation for States to adopt positive measures to ensure the enjoyment of this right.[140] An offer of assistance that is met with refusal might thus under certain conditions constitute a violation of the right to life. The General Assembly reaffirmed in resolutions 43/131 and 45/100 that "the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity".[141]

(5) Recognition that an affected State's discretion regarding consent is not unlimited is reflected in the Guiding Principles on Internal Displacement.[142] The Guiding Principles, which have been welcomed by the former Commission on Human Rights and the General Assembly in unanimously adopted resolutions and described by the Secretary-General as "the basic international norm for protection" of internally displaced persons, note:[143]

> "[c]onsent [to offers of humanitarian assistance] shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance".[144]

The Institute of International Law dealt twice with the question of consent in the context of humanitarian assistance. Its 1989 resolution entitled "The Protection of Human Rights and the Principle of Non-intervention in the Internal Affairs of States", article 5, paragraph 2, states in the authoritative French text:

> "Les États sur le territoire desquels de telles situations de détresse [où la population est gravement menacée dans sa vie ou sa santé] existent ne refuseront pas arbitrairement de pareilles offres de secours humanitaires."[145]

In 2003 the Institute of International Law revisited this issue, stipulating in its Resolution on Humanitarian Assistance under the heading "Duty of affected States not arbitrarily to reject a bona fide offer of humanitarian assistance":

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[139] See International Covenant on Civil and Political Rights , art. 6, para. 1.

[140] Human Rights Committee, General Comment No. 6 (The Right to Life) , para. 5 ("The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures.").

[141] General Assembly resolution 43/131 of 8 December 1988, preambular paragraph 8; General Assembly resolution 45/100 , preambular paragraph 6.

[142] E/CN.4/1998/53/Add.2.

[143] A/59/2005, para. 210.

[144] E/CN.4/1998/53/Add.2, Principle 25, para. 2.

[145] Institute of International Law, Resolution on the protection of human rights and the principle of non-intervention in the internal affairs of States, 13 September 1989, Santiago de Compostela, art. 5, para. 2. The French text is presented in mandatory language, while the English translation reads: "States in whose territories these emergency situations exist should not arbitrarily reject such offers of humanitarian assistance." The explanatory text "où la population est gravement menacée dans sa vie ou sa santé" is drawn from art. 5, para. 1 of that resolution.

> "Affected States are under the obligation not arbitrarily and unjustifiably to reject a bona fide offer exclusively intended to provide humanitarian assistance or to refuse access to the victims. In particular, they may not reject an offer nor refuse access if such refusal is likely to endanger the fundamental human rights of the victims or would amount to a violation of the ban on starvation of civilians as a method of warfare."[146]

(6) The term "withheld" implies a temporal element to the determination of arbitrariness. Both the refusal of assistance, and the failure of an affected State to make known a decision in accordance with draft article 14 [11], paragraph 3 within a reasonable time frame, may be deemed arbitrary. This view is reflected in General Assembly resolutions 43/131[147] and 45/100,[148] which each include the following preambular paragraphs:

> "Concerned about the difficulties that victims of natural disasters and similar emergency situations may experience in receiving humanitarian assistance,
>
> Convinced that, in providing humanitarian assistance, in particular the supply of food, medicines or health care, for which access to victims is essential, rapid relief will avoid a tragic increase in their number."

The 2000 Framework Convention on Civil Defence Assistance likewise reflects among the principles that States parties undertake to respect in terms of providing assistance in the event of a disaster that "[o]ffers of, or requests for, assistance shall be examined and responded to by recipient States within the shortest possible time".[149]

(7) The term "arbitrary" directs attention to the basis of an affected State's decision to withhold consent. The determination of whether the withholding of consent is arbitrary must be determined on a case-by-case basis, although as a general rule several principles can be adduced. First, the Commission considers that withholding consent to external assistance is not arbitrary where a State is capable of providing, and willing to provide, an adequate and effective response to a disaster on the basis of its own resources. Second, withholding consent to assistance from one external source is not arbitrary if an affected State has accepted appropriate and sufficient assistance from elsewhere. Third, the withholding of consent is not arbitrary if the relevant offer is not extended in accordance with the present draft articles. In particular, draft article 7 [6] establishes that humanitarian assistance must take place in accordance with principles of humanity, neutrality and impartiality, and on the basis of non-discrimination. Conversely, where an offer of assistance is made in accordance with the draft articles and no alternate sources of assistance are available, there would be a strong inference that a decision to withhold consent is arbitrary.

(8) An affected State's discretion to determine the most appropriate form of assistance is an aspect of its primary role in the direction, control, coordination and supervision of disaster relief and assistance under draft article 12 [9], paragraph 2. This discretion must be exercised in good faith in accordance with an affected State's international obligations.[150]

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146 Resolution on humanitarian assistance, art. VIII, para. 1.

147 General Assembly resolution 43/131, preambular paragraphs 9 and 10.

148 General Assembly resolution 45/100, preambular paragraphs 8 and 9.

149 Framework Convention on Civil Defence Assistance, art. 3, para. (e).

150 See, e.g., General Assembly resolution 2625 (XXV), annex, para. 1 (noting inter alia that "[e]very State has the duty to fulfil in good faith" obligations assumed by it "in accordance with the Charter of the United Nations", "obligations under the generally recognized principles and rules of international law", and "obligations under international agreements valid under the generally recognized principles and rules of international law").

The Commission nonetheless encourages affected States to give reasons where consent to assistance is withheld. The provision of reasons is fundamental to establishing the good faith of an affected State's decision to withhold consent. The absence of reasons may act to support an inference that the withholding of consent is arbitrary.

(9) In paragraph 3, the Commission opted for the phrase "make known its decision regarding the offer" to give the maximum flexibility to affected States in determining how best to respond to offers of assistance. It was recognized that a rigid duty formally to respond to every offer of assistance may place too high a burden on affected States in disaster situations. The Commission considers the current phrase to encompass a wide range of possible means of response, including a general publication of the affected State's decision regarding all offers of assistance. The paragraph applies both to situations where an affected State accepts assistance and situations in which an affected State withholds its consent.

(10) The Commission considers the phrase "whenever possible" to have a very restricted scope. The phrase directs attention to extreme situations where a State is incapable of forming a view regarding consent due to the lack of a functioning government or circumstances of equal incapacity. The Commission is further of the view that an affected State is capable of making its decision known in the manner it feels most appropriate absent the exceptional circumstances outlined in this paragraph.

Article 15 [13]
Conditions on the provision of external assistance

The affected State may place conditions on the provision of external assistance. Such conditions shall be in accordance with the present draft articles, applicable rules of international law, and the national law of the affected State. Conditions shall take into account the identified needs of the persons affected by disasters and the quality of the assistance. When formulating conditions, the affected State shall indicate the scope and type of assistance sought.

Commentary

(1) Draft article 15 [13] addresses the establishment of conditions by affected States on the provision of external assistance on their territory. It affirms the right of affected States to place conditions on such assistance, in accordance with the present draft articles and applicable rules of international and national law. The draft article indicates how such conditions are to be determined. The identified needs of the persons affected by disasters and the quality of the assistance guide the nature of the conditions. It also requires the affected State, when formulating conditions, to indicate the scope and type of assistance sought.

(2) The draft article furthers the principle enshrined in draft article 12 [9], which recognizes the primary role of the affected State in the direction, control, coordination and supervision of disaster relief and assistance on its territory. By using the phrasing "may place conditions", which accords with the voluntary nature of the provision of assistance, draft article 15 [13] acknowledges the right of the affected State to establish conditions for such assistance, preferably in advance of a disaster's occurrence but also in relation to specific forms of assistance by particular actors during the response phase. The Commission makes reference to "external" assistance because the scope of the provision covers the assistance provided by third States or other assisting actors, such as competent international organizations, but not assistance provided from internal sources, such as domestic non-governmental organizations.

(3) The draft article places limits on an affected State's right to condition assistance, which must be exercised in accordance with applicable rules of law. The second sentence

outlines the legal framework within which conditions may be imposed, which comprises "the present draft articles, applicable rules of international law, and the national law of the affected State." The Commission included the phrase "the present draft articles" to stress that all conditions must be in accordance with the principles reflected in previous and subsequent draft articles, there being no need to repeat an enumeration of the humanitarian and legal principles already addressed elsewhere, notably, good faith, sovereignty and the humanitarian principles dealt with in draft article 7 [6], that is, humanity, neutrality, impartiality and non-discrimination.

(4) The reference to national law emphasizes the authority of domestic laws in the particular affected area. It does not, however, imply the prior existence of national law geared to the specifics of the conditions brought forth by an affected State in the event of a disaster. Although there is no requirement of specific national legislation before conditions can be fixed, they must be in accordance with whatever relevant domestic legislation is in existence in the affected State, as envisaged in draft article 17 [14].

(5) The affected State and the assisting actor must both comply with the applicable rules of national law. The affected State may only impose conditions that are in accordance with such laws, and the assisting actor must comply with such laws at all times throughout the duration of assistance. This reciprocity is not made explicit in the draft article, since it is inherent in the broader principle of respect for national law. Existing international agreements support the assertion that assisting actors must comply with national law. The ASEAN Agreement, for example, provides in article 13 (2) that "[m]embers of the assistance operation shall respect and abide by all national laws and regulations". Several other international agreements also require assisting actors to respect national law[151] or to act in accordance with the law of the affected State.[152]

(6) The duty of assisting actors to respect national law implies the obligation to require that: members of the relief operation observe the national laws and regulations of the affected State,[153] the head of the relief operation takes all appropriate measures to ensure the observance of the national laws and regulations of the affected State,[154] and assisting personnel cooperate with national authorities.[155] The obligation to respect the national law and to cooperate with the authorities of the affected State accords with the overarching principle of the sovereignty of the affected State and the principle of cooperation.

(7) The right to condition assistance is the recognition of a right of the affected State to deny unwanted or unneeded assistance, and to determine what and when assistance is appropriate. The third sentence of the draft article gives an explanation of what is required of conditions set by affected States, namely, that they must "take into account" not only the identified needs of the persons affected by disasters but also the quality of the assistance.

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[151] See, e.g., the Inter-American Convention to Facilitate Disaster Assistance, 1991, arts. VIII and XI (d); and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, 1986, art. 8 (7).

[152] *Ibid*; Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation (BSEC) on Collaboration in Emergency Assistance and Emergency Response to Natural and Man-made Disasters, 1998, arts. 5 and 9.

[153] See, e.g., Convention on the Transboundary Effects of Industrial Accidents, 17 March 1992, United Nations, *Treaty Series*, vol. 2105, p. 457, annex X (1) ("The personnel involved in the assisting operation shall act in accordance with the relevant laws of the requesting Party.").

[154] See, e.g., ASEAN Agreement, art. 13 (2) ("The Head of the assistance operation shall take all appropriate measures to ensure observance of national laws and regulations.").

[155] See, e.g. Peter MacAlister-Smith, *Draft international guidelines for humanitarian assistance operations*, para. 22 (b) ("At all times during humanitarian assistance operations the assisting personnel shall… [c]ooperate with the designated competent authority of the receiving State.").

Nevertheless, the phrase "take into account" does not denote that conditions relating to the identified needs and the quality of assistance are the only ones which States can place on the provision of external assistance.

(8) The Commission included the word "identified" to signal that the needs must be apparent at the time conditions are set and that needs can change as the situation on the ground changes and more information becomes available. It implies that conditions should not be arbitrary, but be formulated with the goal of protecting those affected by a disaster. "Identified" indicates there must be some process by which needs are made known, which can take the form of a needs assessment, preferably also in consultation with assisting actors. However, the procedure to identify needs is not predetermined, and it is left to the affected State to follow the most suitable one. This is a flexible requirement that may be satisfied according to the circumstances of a disaster and the capacities of the affected State. In no instance should identifying needs hamper or delay prompt and effective assistance. The provision of the third sentence is meant to "meet the essential needs of the persons concerned" in the event of a disaster, as expressed in draft article 2 [2], and should be viewed as further protection of the rights and needs of persons affected by disasters. The reference to "needs" in both draft articles is broad enough to encompass the special needs of women, children, the elderly, persons with disabilities, and vulnerable or disadvantaged persons and groups.

(9) The inclusion of the word "quality" is meant to ensure that affected States have the right to reject assistance that is not necessary or that may be harmful. Conditions may include restrictions based on, inter alia, safety, security, nutrition and cultural appropriateness.

(10) Draft article 15 [13] contains a reference to the "scope and type of assistance sought." This is in line with previous international agreements that contain a similar provision.[156] By the use of the words "shall indicate" the draft article puts the onus on the affected State to specify the type and scope of assistance sought when placing conditions on assistance. At the same time, it implies that once fixed, the scope and type of such assistance will be made known to the assisting actors that may provide it, which would facilitate consultations. This will increase the efficiency of the assistance process, and will ensure that appropriate assistance reaches those in need in a timely manner.

(11) The Commission considered several possibilities for the proper verb to modify the word "conditions". The Commission's decision to use two different words, "place" and "formulate", is a stylistic choice that does not imply differentiation of meaning between the two uses.

Article 16 [12]
Offers of external assistance

In responding to disasters, States, the United Nations, and other competent intergovernmental organizations have the right to offer assistance to the affected State. Relevant non-governmental organizations may also offer assistance to the affected State.

Commentary

(1) Draft article 16 [12] acknowledges the interest of the international community in the protection of persons in the event of disasters, which is to be viewed as complementary to

[156] See, e.g., Tampere Convention, article 4 (2) ("A State Party requesting telecommunication assistance shall specify the scope and type of assistance required.").

the primary role of the affected State enshrined in draft article 12 [9]. It is an expression of the principle of solidarity underlying the whole set of draft articles on the topic and, in particular, of the principle of cooperation embodied in draft articles 8 [5], 9 [5 *bis*] and 10 [5 *ter*].

(2) Draft article 16 [12] is only concerned with "offers" of assistance, not with the actual "provision" thereof. Such offers, whether made unilaterally or in response to a request, are essentially voluntary and should not be construed as recognition of the existence of a legal duty to assist. Nor does an offer of assistance create for the affected State a corresponding obligation to accept it. In line with the fundamental principle of sovereignty informing the whole set of draft articles, an affected State may accept in whole or in part, or not accept, offers of assistance from States or non-State actors in accordance with draft article 14 [11].

The requirement that offers of assistance be made "in accordance with the present draft articles" implies, among other consequences, that such offers cannot be discriminatory in nature nor be made subject to conditions that are unacceptable to the affected State.

(3) Offers of assistance which are consistent with the present draft articles cannot be regarded as interference in the affected State's internal affairs. This conclusion accords with the statement of the Institute of International Law in its 1989 resolution on the protection of human rights and the principle of non-intervention in internal affairs of States:

> "An offer by a State, a group of States, an international organization or an impartial humanitarian body such as the International Committee of the Red Cross, of food or medical supplies to another State in whose territory the life or health of the population is seriously threatened, cannot be considered an unlawful intervention in the internal affairs of that State. [...]"[157]

(4) Draft article 16 [12] addresses the question of offers of assistance to affected States made by third actors by mentioning in two separate sentences those most likely to be involved in such offers after the occurrence of a disaster. States, the United Nations and other competent intergovernmental organizations are listed in the first sentence while the second concerns non-governmental organizations. The Commission decided to use a different wording in each of the two sentences. In the first sentence it opted for the phrasing "have the right to offer assistance" for reasons of emphasis. States, the United Nations and intergovernmental organizations not only are entitled but are also encouraged to make offers of assistance to the affected State. When referring to non-governmental organizations in the second sentence, the Commission adopted instead the wording "may also offer assistance" to stress the distinction, in terms of nature and legal status, that exists between the position of those organizations and that of States and intergovernmental organizations.

(5) The second sentence of draft article 16 [12] recognizes the important role played by those non-governmental organizations which, because of their nature, location and expertise, are well placed to provide assistance in response to a particular disaster. The position of non-governmental, and other, actors in carrying out relief operations is not a novelty in international law. The Geneva Conventions of 1949 already provided that, in situations of armed conflict:

> "[...] An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict."[158]

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[157] Art. 5.

[158] See, for example, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, art. 3 (2).

Similarly, the Protocol II Additional to the Geneva Conventions provides that:

> "Relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations, may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked."[159]

The important contribution of non-governmental organizations, working with strictly humanitarian motives, in disaster response was stressed by the General Assembly in its resolution 43/131 of 8 December 1988, entitled "Humanitarian assistance to victims of natural disasters and similar emergency situations", in which the Assembly, inter alia, invited all affected States to "facilitate the work of [such] organizations in implementing humanitarian assistance, in particular the supply of food, medicines and health care, for which access to victims is essential" and appealed "to all States to give their support to [those] organizations working to provide humanitarian assistance, where needed, to the victims of natural disasters and similar emergency situations".[160]

Article 17 [14]
Facilitation of external assistance

1. The affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance regarding, in particular:

(a) civilian and military relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement; and

(b) equipment and goods, in fields such as customs requirements and tariffs, taxation, transport, and disposal thereof.

2. The affected State shall ensure that its relevant legislation and regulations are readily accessible, to facilitate compliance with national law.

Commentary

(1) Draft article 17 [14] addresses the facilitation of external assistance. Its purpose is to ensure that national law accommodates the provision of prompt and effective assistance. To that effect, it further requires the affected State to ensure that its relevant legislation and regulations are readily accessible to assisting actors.

(2) The draft article provides that affected States "shall take the necessary measures" to facilitate the prompt and effective provision of assistance. The phrase "take necessary measures, within its national law" may include, inter alia, legislative, executive or administrative measures. Measures may also include actions taken under emergency legislation, as well as permissible temporary adjustment or waiver of the applicability of particular national legislation or regulations, where appropriate. In formulating the draft article in such a manner, the Commission encourages States to allow for temporary non-applicability of their national laws in the event of disasters, and for appropriate provisions to be included within their national law so as to not create any legal uncertainty in the critical period following a disaster when such emergency provisions become necessary.

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[159] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977, art. 18 (1).

[160] See General Assembly resolution 43/131 of 8 December 1988, paras. 4–5.

(3) The draft article outlines examples of areas of assistance in which national law should enable the taking of appropriate measures. The words "in particular" before the examples indicate that this is not an exhaustive list, but rather an illustration of the various areas that may need to be addressed by national law to facilitate prompt and effective assistance.

(4) Subparagraph (a) envisages relief personnel. Specific mention of both civilian and military relief personnel indicates the Commission's recognition that the military often plays a key role in disaster response actions. Military relief personnel are those involved in the provision of humanitarian assistance. The areas addressed in the subparagraph provide guidance as to how personnel can be better accommodated. Granting of privileges and immunities to assisting actors is an important measure included in many international agreements to encourage the help of foreign aid workers.[161] Waiver or expedition of visa and entry requirements and work permits is necessary to ensure prompt assistance.[162] Without a special regime in place, workers may be held up at borders or unable to work legally during the critical days after a disaster, or forced to exit and re-enter continually so as not to overstay their visas. Freedom of movement means the ability of workers to move freely within a disaster area in order to properly perform their specifically agreed upon functions.[163] Affected States can restrict access to certain sensitive areas while still allowing for freedom within the area concerned. Unnecessary restriction of movement of relief personnel inhibits workers' ability to provide flexible assistance.

(5) Subparagraph (b) addresses equipment and goods, which encompasses any and all supplies, tools, machines, foodstuffs, medicines, and other objects necessary for relief operations. The Commission intends that this category also include search dogs, which are normally regarded as goods and equipment, rather than creating a separate category for animals. Goods and equipment are essential to the facilitation of effective assistance, and national laws must be flexible to address the needs of persons affected by disasters and to ensure prompt delivery. Custom requirements and tariffs, as well as taxation, should be waived or lessened in order to reduce costs and prevent delay of goods.[164] Equipment and goods that are delayed can quickly lose their usefulness, and normal procedures in place aiming at protecting the economic interests of a State can become an obstacle in connection with aid equipment that can save lives or provide needed relief.

(6) The second paragraph of the draft article requires that all relevant legislation and regulations are readily accessible to assisting actors. By using the words "readily accessible", what is required is ease of access to such laws without creating the burden on the affected State to physically provide this information separately to all assisting actors.

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[161] See, e.g., the Framework Convention on Civil Defence Assistance, art. 4 (5) ("The Beneficiary State shall, within the framework of national law, grant all privileges, immunities, and facilities necessary for carrying out the assistance.").

[162] The League of Red Cross Societies has long noted that entry requirements and visas serve as a "time-consuming procedure which often delays the dispatch of such delegates and teams," thus delaying the vital assistance the affected State has a duty to provide. Resolution adopted by the League of Red Cross Societies Board of Governors at its 33rd session, Geneva, 28 October–1 November, 1975.

[163] See *Model Rules for Disaster Relief Operations*, 1982, United Nations Institute for Training and Research, Policy and Efficacy Studies No. 8 (Sales No. E.82.XV.PE/8), annex A, rule 16, which states that an affected State must permit assisting "personnel freedom of access to, and freedom of movement within, disaster stricken areas that are necessary for the performance of their specifically agreed functions."

[164] This is stressed in various international treaties. See, for example, Tampere Convention, art. 9 (4); see also ASEAN Agreement, art. 14 (b).

Article 18
Protection of relief personnel, equipment and goods

The affected State shall take the appropriate measures to ensure the protection of relief personnel, equipment and goods present in its territory for the purpose of providing external assistance.

Commentary

(1) Draft article 18 establishes the obligation for the affected State to take the measures which would be appropriate in the circumstances to ensure the protection of relief personnel, equipment and goods involved in the provision of external assistance. Taking into account the often chaotic situations arising from disasters, the security concerns for these individuals and objects might create obstacles for the carrying out of activities aimed at giving support to the victims, thus reducing the likelihood that their essential needs would be properly satisfied.

(2) This draft article, therefore, complements draft article 17 [14] in establishing a coherent set of obligations whereby the affected State is expected to perform a series of activities which are necessary in order to guarantee to assisting States and other assisting actors the possibility to deliver an efficient and prompt assistance. Nevertheless, the two provisions have a somewhat different focus and approach. Draft article 17 [14] highlights the need for the affected State to establish a domestic legal order capable of facilitating the external assistance, mainly through the adoption of a series of legislative and regulatory actions. On the other hand, the question of the protection of relief personnel and their equipment and goods has traditionally — and for compelling policy reasons owing to its nature and the kind of measures to be adopted — been dealt with as a distinct matter, deserving of its own separate treatment, as the present draft article does.

(3) The measures to be adopted by the affected State may vary in content and can imply different forms of State conduct due to the context-driven nature of the obligation concerned. In particular, the flexibility inherent in the concept of "appropriate measures" suggests that the affected State may assume different obligations depending on the actors involved in potential threats to relief personnel, equipment and goods.

(4) A preliminary requirement for the affected State is to prevent its organs from adversely affecting relief activities. In this case, the obligation is one of result, with a clear content that imposes the duty on the affected State not to cause harm to the personnel, equipment and goods involved in external assistance through acts carried out by its organs.

(5) Secondly, draft article 18 contemplates a series of measures to be adopted to prevent detrimental activities caused by non-State actors aimed, for instance, at profiting from the volatile security conditions that may ensue from disasters in order to obtain illicit gains from criminal activities directed against disaster relief personnel, equipment and goods. In this respect, the draft article envisages an obligation of conduct instead of one of result. The affected State is not expected to succeed, whatever the circumstances, in preventing the commission of harmful acts but rather to endeavor to attain the objective sought by the relevant obligation. In particular, the wording "appropriate measures" allows a margin of discretion to the affected State in deciding what actions to take in this regard. It requires the State to act in a reasonably cautious and diligent manner by attempting to avoid the harmful events that may be caused by non-State actors. Measures to be taken by States in the realization of their best efforts to achieve the expected objective are context-dependent. Consequently, draft article 18 does not list the means to achieve the result aimed at, as this obligation can assume a dynamic character according to the evolving situation.

(6) Diverse circumstances might be relevant to evaluate the appropriateness of the measures to be taken in a disaster situation in implementation of this obligation. These

include the difficulties that a State might encounter when attempting to perform its regular activities, due to the unruly situation created by the disaster and the extent of the resources at the disposal of the concerned State which might have been seriously affected by the disaster. Likewise, the security conditions prevailing in the relevant area of operations and the attitude and behavior of the humanitarian actors involved in relief operations, who might disregard the directive role attributed to the local authorities, thus increasing the possibility of their being faced with security risks. Furthermore, if harmful acts are directed against relief personnel, equipment and goods, the affected State shall address them by exercising its inherent competence to repress crimes committed within the area on which a disaster occurs.

(7) International humanitarian actors can themselves contribute to the realization of the goal sought by adopting in their own planning and undertaking of operations, a series of mitigation measures geared to reducing their vulnerability to security threats. This may be achieved, for instance, through the elaboration of proper codes of conduct in this field, training activities and furnishing appropriate information about the conditions under which their staffs are called upon to operate and the standards of conduct they are required to meet. In any event, the adoption of such mitigating measures should not interfere with the taking of autonomous measures by the affected State.

(8) At the same time, it must be emphasized that security risks should be evaluated having in mind the character of relief missions and the need to guarantee to victims an adequate and effective response to a disaster. Draft article 18 should not be misinterpreted as entailing the creation of unreasonable and disproportionate hurdles for relief activities. As already emphasized with regard to draft article 17 [14], the measures that, based on security concerns, may be adopted to restrict the movement of relief personnel should not result in unnecessarily inhibiting the capacity of these actors to provide assistance to the victims of disasters.

(9) Similarly, the possibility of resorting to armed escorts in disaster relief operations to dispel safety concerns should be strictly assessed according to the best practices developed in this area by the main humanitarian actors. Particular attention is drawn to the 2013 Inter-Agency Standing Committee Non-Binding Guidelines on the Use of Armed Escorts for Humanitarian Convoys,[165] which are designed to assist relevant actors in evaluating in an appropriate manner the taking of such a sensitive course of action. As explained in that document, humanitarian convoys will not, as a general rule, use armed escorts unless exceptional circumstances are present which make the use of armed escorts necessary. In order for the exception to be adopted, the consequences of and the possible alternatives to the use of armed escorts shall be considered by the relevant actors, especially taking into account that the security concerns that may prevail in disaster situations are generally far less serious than those present in other scenarios.

(10) Draft article 18 provides protection for "relief personnel, equipment and goods", i.e. the pertinent persons and objects qualified as such in draft article 4, subparagraphs (e) and (f), and involved in providing external assistance. As emphasized in other provisions of the current draft articles, mainly draft articles 12 [9] and 14 [11], external assistance is contingent upon the consent of the affected State which has the primary role in the direction, control, coordination and supervision of such activities. Therefore, once the affected State has requested assistance or has accepted offers submitted by assisting States it shall endeavor to guarantee the protection prescribed in draft article 18.

[165] 27 February 2013.

(11) Such a comprehensive approach is relevant for the proper fulfillment of the obligation enshrined in draft article 18. Domestic authorities are best placed to assure a proper safety framework for the performance of relief activities. In particular, they are requested to evaluate the security risks that might be incurred by international relief personnel, to cooperate with them in dealing with safety issues and to coordinate the activities of external actors, taking into account those concerns.

(12) In accordance with draft article 4, subparagraph (e), the relief personnel that would potentially benefit from draft article 18 may belong to either the civilian or military personnel sent, as the case may be, by an assisting State, competent intergovernmental organization, relevant non-governmental organization or any other entity external to the affected State, providing assistance to that State at its request or with its consent. All these categories are, thus, pertinent regarding the application of draft article 18. The reference to the term "external assistance" reflects the position, also affirmed in the commentary to draft article 15 [13],[166] that the draft articles only regulate the activities of actors which are external to the affected State.

(13) Equipment and goods, as defined in draft article 4, subparagraph (f), relating to the activities of relief personnel, likewise benefit from the application of draft article 18. Being at the disposal of assisting States or other assisting actors, equipment and goods will be covered by the application of draft article 18 independently from their origin. These objects could also be directly acquired in the domestic market of the affected State. The wording "present in its territory" is intended to clarify this aspect.

Article 19 [15]
Termination of external assistance

The affected State and the assisting State, and as appropriate other assisting actors, shall consult with respect to the termination of external assistance and the modalities of termination. The affected State, the assisting State, or other assisting actor wishing to terminate shall provide appropriate notification.

Commentary

(1) Draft article 19 [15] deals with the question of termination of external assistance. The provision is comprised of two sentences. The first sentence concerns the requirement that the affected State, the assisting State and, as appropriate, other assisting actors consult each other as regards the termination of the external assistance, including the modalities of such termination. The second sentence sets out the requirement that parties wishing to terminate assistance provide appropriate notification.

(2) When an affected State accepts an offer of assistance, it retains control over the duration for which that assistance will be provided. Draft article 12 [9], paragraph 2, explicitly recognizes that the affected State has the primary role in the direction, control, coordination and supervision of disaster relief and assistance on its territory. For its part, draft article 14 [11] requires the consent of the affected State to external assistance, with the caveat that consent shall not be withheld arbitrarily. The combined import of the foregoing provisions is that the affected State can withdraw consent, thereby terminating external assistance and bringing to an end the legal regime under which the assistance was being provided.

(3) Draft article 19 [15] seeks to strike a balance between the right of the affected State to terminate external assistance and the position of assisting actors, with a view to

[166] See para. (2) of the commentary to draft art. 15 [13].

providing adequate protection to persons affected by disasters. Accordingly, the provision does not recognize the right of only the affected State to unilaterally terminate assistance. Instead, the Commission acknowledges that assisting States and other assisting actors may themselves need to terminate their assistance activities. Draft article 19 [15] thus preserves the right of any party to terminate the assistance being provided, on the understanding that this is done in consultation with the other assisting States or assisting actors, as appropriate.

(4) The words "other assisting actors" are drawn from existing instruments[167] to describe international organizations and non-governmental organizations which provide disaster relief and assistance, and are defined in draft article 4 on the use of terms. Draft article 19 [15] is drafted in bilateral terms, but it does not exclude the scenario of multiple assisting actors providing external assistance.

(5) The requirement to consult reflects the spirit of solidarity and cooperation implicit throughout the draft articles, and the principle of cooperation enshrined in draft articles 8 [5], 9 [5 *bis*] and 10 [5 *ter*]. The Commission anticipates that termination may become necessary for a variety of reasons and at different stages during the provision of assistance. The relief operations may reach a stage where it would be only logical either for the affected State or one or more of the assisting parties to cease operations. Circumstances leading to termination may include instances in which the resources of an assisting State or other assisting actor are depleted, or where the occurrence of another disaster makes the diversion of resources necessary. Draft article 19 [15] is flexible, allowing for the adjustment of the duration of assistance according to the circumstances, while implying that parties should consult in good faith. In any event, draft article 19 [15] should be read in light of the purpose of the draft articles, as indicated in draft article 2 [2]; thus, decisions regarding the termination of assistance are to be made taking into consideration the needs of the persons affected by disaster, namely, whether and how far such needs have been met.

(6) The word "modalities" refers to the procedures to be followed in terminating assistance. Even though termination on a mutual basis may not always be feasible, consultation in relation to the modalities would enable the relevant parties to facilitate an amicable and efficient termination.

(7) The second sentence establishes a requirement of notification by the party wishing to terminate external assistance. Appropriate notification is necessary to ensure a degree of stability in the situation, so that no party is adversely affected by an abrupt termination of assistance. The provision is drafted flexibly so as to anticipate notification before, during or after the consultation process. No procedural constraints have been placed on the notification process. However, notification should be "appropriate" according to the circumstances, including the form and timing, preferably early, of the notification.

Article 20
Relationship to special or other rules of international law

The present draft articles are without prejudice to special or other rules of international law applicable in the event of disasters.

Commentary

(1) Draft article 20 deals with the relationship between the draft articles and special or other rules of international law. It seeks to clarify the way in which the draft articles interact with certain rules of international law which a) deal with the same subject matter of the

[167] IFRC Guidelines, 2007, art. 12, and annotations thereto.

draft articles; b) are not directly concerned with disasters but would nonetheless apply in situations covered by the draft articles.

(2) The rationale behind the first part of the provision is to clarify that treaties or other rules of international law that set out obligations having a higher degree of specificity than the present draft articles are not displaced by them. This approach reflects the *lex specialis* principle and aims at safeguarding the continued application of the dense web of existing obligations regarding matters covered by the present draft articles.

(3) The draft article is meant to cover different forms of special rules. The latter include more detailed rules enshrined in treaties whose scope *ratione materiae* falls within that of the present draft articles (for example regional or bilateral treaties on mutual assistance in case of disasters), as well as those included in treaties devoted to other matters but which contain specific rules addressing disaster situations (for example Art. F, Section 5 of the Annex to the 1965 Convention on Facilitation of International Maritime Traffic).

(4) This approach also accords with the position taken by the Commission in draft article 21 [4] which concerns the applicability of the draft articles in situations of armed conflict. While it is accepted that in such situations the rules of international humanitarian law should be given precedence over those contained in the present draft articles, these would continue to apply "to the extent" that some legal issues raised by a disaster which occurred in the same area as an armed conflict would not be covered by the rules of international humanitarian law. In this manner the present draft articles will contribute to fill possible legal gaps in the protection of persons affected by disasters occurring during an armed conflict.

(5) The second part of draft article 20 ("other rules") deals with the interaction between the present draft articles and rules of international law which are not directly concerned with disasters, but which nonetheless may be applied in the event of disasters (for example provisions concerning the law of treaties – in particular, those related to the supervening impossibility of performance and the fundamental change of circumstances – as well as the rules on the responsibility of both States and international organizations, and the responsibility of individuals). The provision confirms that also this category of rules is not displaced by the present draft articles, thus complementing the lex specialis principle stated in the first part of the draft article.

(6) The preservation mechanism enshrined in draft article 20 applies to the rules of customary international law. In fact, the draft articles do not cover all the issues which may be relevant in the event of disasters. Moreover, the draft articles do not intend to preclude the further development of customary international rules in this field. In this respect, the draft article is inspired by the preambular paragraph of the Vienna Convention on the Law of Treaties of 1969, which states that: "the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention".

(7) In addition, it should be borne in mind that rules of general application not directly concerned with disasters might also be contained in treaty law. The Commission therefore considered that the wording "other rules of international law" was the most appropriate to indicate the rules of international law that might interact with the draft articles, for it expresses the idea that the preservation mechanism enshrined in draft article 20 could be applied to all categories of international law rules.

Article 21 [4]
Relationship to international humanitarian law

The present draft articles do not apply to situations to which the rules of international humanitarian law are applicable.

Commentary

(1) Draft article 21 [4] deals with the relationship of the draft articles with international humanitarian law, and, accordingly, the extent to which the draft articles cover situations of armed conflict, which can have an equally calamitous impact on the functioning of societies. The provision is formulated in a manner intended to clarify the relationship by giving precedence to the rules of international humanitarian law in situations where they are applicable.

(2) The Commission considered including an express exclusion of the applicability of the draft articles over armed conflict as a further element in the definition of "disaster" (draft article 3 [3]), so as to avoid any interpretation that, for purposes of the draft articles, armed conflict would be covered to the extent that the threshold criteria in draft article 3 [3] were satisfied. Such approach was not followed since a categorical exclusion could be counterproductive, particularly in situations of "complex emergencies" where a disaster occurs in an area where there is an armed conflict. A blank exclusion of the applicability of the draft articles because of the coexistence of an armed conflict would be detrimental to the protection of the persons affected by the disaster, especially when the onset of the disaster pre-dated the armed conflict.

(3) The Commission also initially considered rendering the provision as a more straightforward "without prejudice" clause, as is done in draft article 20, merely preserving the applicability of both sets of rules, and thereby suggesting that the draft articles applied in the context of armed conflict to the same extent as existing rules of international law. Instead, the Commission settled for addressing the matter in terms of the relationship between the draft articles and international humanitarian law. While the draft articles do not seek to regulate the consequences of armed conflict, they can nonetheless apply in situations of armed conflict to the extent that existing rules of international law, particularly the rules of international humanitarian law, do not apply.